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# REPORTS

OF

## CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

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VOLUME 170.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN NOVEMBER  
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AND FEBRUARY TERM, 1898.

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ISAAC NEWTON PHILLIPS,  
REPORTER.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

---

JAMES H. KIRKHAM

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed November 8, 1897.*

1. INDICTMENT—*omission in indictment for murder, of averment that the deceased was a "human being" is not fatal.* The omission from the charging part of an indictment for murder, of the averment that the deceased was a *human being* in the peace of the People, is not fatal, as the name applied to the deceased imports a human being.

2. SAME—*effect of omission of word "same" preceding "People of the State of Illinois."* Concluding each count of an indictment with the words "against the peace and dignity of the People of the State of Illinois" instead of "against the peace and dignity of the *same* People," is not ground for quashing the indictment.

3. SAME—*averment of place of death is not a necessary averment.* The averment, in an indictment for murder, of the place where the death occurred is not necessary and need not be proven as laid.

4. SAME—*indictment returned in open court becomes part of record without filing.* An indictment returned by the grand jury in open court, as shown by the record, becomes part of the record at once, though the clerk does not file it, and the court may allow it filed, after verdict, *nunc pro tunc* as of the date it was returned.

5. CRIMINAL LAW—*court may permit names of witnesses to be endorsed on indictment at trial.* The trial court may, in its discretion, permit the names of witnesses to be endorsed upon an indictment at trial, and its action in so doing cannot be assigned for error.

6. SAME—*defendant may waive his right to pass upon jurors in panels of four.* A defendant may waive his right to pass upon jurors in panels of four, and the court may thereafter require him to pass upon jurors called singly or by twos or threes.

7. EVIDENCE—*what is immaterial in trial for murder.* Whether a witness for the prosecution in a murder trial had sent persons to secrete themselves in a room near the residence of the defendant to observe the effect upon him of information given him by his wife that a warrant was out for his arrest, is an immaterial and irrelevant circumstance.

8. SAME—*what sufficient to show declarations were made in contemplation of death.* Evidence that the deceased, who was a physician, expressed his conviction that the blow he had received would cause a clot to form on his brain and that his death would inevitably occur, and that he directed the disposition of property in contemplation of his death, which occurred some three weeks later, sufficiently shows that he had abandoned all hope of life.

9. SAME—*what sufficient to sustain conviction for murder.* Evidence that the defendant in a murder trial was seen going into an alley where the deceased was assaulted, shortly before the assault took place, and that he was seen running out of the alley a few minutes later, is sufficient, when considered with the dying declarations of the deceased that he had been struck upon the head with a hard substance by the defendant, to sustain a conviction.

WRIT OF ERROR to the Circuit Court of Hardin county;  
the Hon. A. K. VICKERS, Judge, presiding.

GEORGE W. PILLOW, for plaintiff in error.

E. C. AKIN, Attorney General, (D. C. HAGLE, C. A. HILL, J. A. LEDBETTER, H. R. FOWLER, and WHITNEL & GILLESPIE, of counsel,) for the People.

Mr. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

Plaintiff in error was indicted and convicted of the crime of murder and sentenced to the penitentiary for a term of fourteen years. The evidence shows that on or about the 16th day of February, 1894, Newton L. Fowler,

a physician by profession, was assaulted and struck on the head with some hard substance, from which he died on the 7th day of March, following.

The plaintiff in error raises numerous questions by his assignments of error. It is first claimed that the court erred in not quashing the indictment, because in the conclusion of the charging part it is not averred that the deceased is a human being in the peace of the People. That question was passed upon by this court in *Palmer v. People*, 138 Ill. 356, where it was said (p. 362): "The first objection made to the second count of the indictment, as set forth in the motions to quash and in arrest, is that it contains no allegation that George Bopp, alleged to have been killed by the defendant, was a human being. This allegation is said to be necessary because section 140 of the Criminal Code defines murder to be 'the unlawful killing of a human being in the peace of the People, with malice aforethought, either express or implied.' It need not be averred that the deceased was a human being. The name imports a human being. The language of the indictment and the name applied to the deceased are always used to describe human beings." It is averred in the indictment that the assault was made upon the person of Newton L. Fowler, a human being then and there being. In the averment of the wounds on the head of Newton L. Fowler, which caused his death, it is not charged that he was a human being. It is clear that allegation is sufficient under any rule, and under the authority above quoted it is not necessary to make the averment claimed to have been improperly omitted.

It is further urged as error in overruling the motion to quash, that each count of the indictment concludes "against the peace and dignity of the People of the State of Illinois," instead of using the term "against the peace and dignity of the *same* People of the State of Illinois." Whilst the latter term is that used in the constitution, the omission of the word "same" does not vitiate the in-

dictment, and we hold there was no error in overruling the motion to quash.

The next contention of the plaintiff in error is, that the indictment averred the deceased died from the wounds so inflicted in Hardin county, Illinois, when it is shown that his death occurred in Evansville, Indiana. The averment as to the place of death is not a necessary averment, and where an averment in an indictment is of a matter unnecessary it is not always required to be proven. The place where the blow was inflicted is the place where the crime was committed, and it is wholly immaterial to what points the injured man wandered or was removed, or the extent to which he changed his place of residence, or where he died. The place of the offense is the one fact to be proven with reference to place, and the fact of death only determines the character of the crime, and relates back to that act and gives quality and fixes the character of the offense. *Nash v. State*, 2 Green, 286; *State v. Bowen*, 16 Kan. 475; *Ex parte McNeeley*, 36 W. Va. 64.

It appears that the indictment was returned into open court by the grand jury in a body, but the clerk failed to place his file-mark on the indictment at that time, and after verdict, on motion of the State's attorney, the court ordered the clerk to place his file-mark thereon at the date on which it was returned into open court as shown by the record, *nunc pro tunc*, to which plaintiff in error objected. The indictment having been returned into open court by the grand jury in a body, which fact was shown by the record, it became a part of the records of the court at once, and the omission of the clerk to place his file-mark thereon did not affect its legality or destroy its character. The record shows the indictment to be a part of the records, and the defendant was in nowise prejudiced by allowing, and it was not erroneous to allow, the file-mark to be placed thereon.

Previous to the commencement of the trial, on motion of the State's attorney, leave was granted to indorse on



the indictment, after notice, the names of witnesses, some twenty or thirty in number. Defendant objected, and his objection was overruled, to which he excepted. In *Gore v. People*, 162 Ill. 259, it was said (p. 265): "It is within the sound discretion of the court to allow witnesses to be examined whose names are not so endorsed on the indictment, and the exercise of that discretion cannot be assigned as error,"—and numerous cases in this State are there cited sustaining that proposition. It was not error to permit the endorsement of the names of witnesses on the indictment after notice, nor to permit their being called and examined.

It is then urged, that in the selection of the jury, after two panels of four jurors each had been accepted and sworn, counsel for the prosecution and for the defendant selected one other juror, waiving the right to have four jurors presented and sworn, and after the nine jurors were selected three were called into the box, who were examined and accepted by the State and one was challenged by the defendant, who then declined to pass upon the other two until the three jurors were in the box. The court held that the defendant, having consented to depart from the rule of having the four jurors tendered, could not afterwards insist on that rule, or that three should be tendered. The defendant had an undoubted right to waive his right of having four jurors tendered as a panel, (*Perteet v. People*, 70 Ill. 171,) and having waived his right there was no statute fixing the number which might be called, and it was within the discretion of the court, when the right to the panel of four was waived, to call one or three and require the parties to pass upon them, (*Walker v. Collier*, 37 Ill. 362,) and in so doing there was no error.

The State called as a witness one Thomas Robinson, whose testimony was prejudicial to the defendant. The defendant called William J. Blair and John Tyer, both residents of Cave-in-Rock, where Thomas Robinson re-

sided some years anterior to the trial. Robinson had for some years been a resident of Elizabethtown. Blair and Tyer were called as witnesses to impeach the general reputation of the witness Robinson for truth and veracity, their acquaintance with him and their knowledge of him existing whilst he was a resident of Cave-in-Rock. This testimony was objected to and the objection sustained by the court. This evidence was competent. (*Holmes v. Stateler*, 17 Ill. 453; *Blackburn v. Mann*, 85 id. 222.) Robinson, however, had been permanently a resident of Elizabethtown from the time he left Cave-in-Rock,—a period of over four years,—and was well known there. He was not a wandering person without a residence or place of abode, but had established not only a residence, but a reputation in Elizabethtown that was generally known. The defendant called four witnesses, residents of the latter city, by whom he introduced impeaching testimony as to Robinson. Whilst evidence as to the general reputation for truth and veracity of a witness who has resided at any particular place long enough to have established a reputation is admissible, its weight is for the jury. Where a witness has established a residence and made a reputation at another place at a later period, then, when called as a witness, the case is different from that of a wandering person, as in *Holmes v. Stateler*, and *Blackburn v. Mann*, *supra*. We do not hold the sustaining of objection to this evidence is reversible error.

Counsel for the defendant asked the witness H. R. Fowler, on cross-examination, whether or not he sent two persons to secrete themselves in a room near the residence of the defendant to notice the effect on him of information given by his wife of the fact that a warrant was out for him charging him with the murder of Newton L. Fowler. This question was objected to and the objection sustained. A question was also asked the witness F. M. Fowler as to whether the two persons so secreted gave any information or made any report to him,

which was objected to by counsel for the prosecution and the objection sustained, to which exception was taken, as also were objections sustained to the questions asked of the two persons so secreted. This evidence had no relevancy to the issue before the jury, and was immaterial and irrelevant, and it was not error to sustain the objection thereto.

It is contended by the plaintiff in error that the dying declaration admitted on the part of the State was not proper testimony. Newton L. Fowler, a physician by profession, about thirty-two years of age and a strong and healthy man, who was engaged in the practice of his profession, received a blow which fractured his skull. He was leaving his stable at a late hour of the night, when a man suddenly approached and struck him. He became unconscious, but within two hours revived and called out. A man who came to his relief got him into his house, and blood was found running from his nose, mouth and ears. His brothers were sent for, who took him to his home. On the next day his condition was critical and serious, and a day or two thereafter, against the view of other physicians, he declared the blow of such a character it would cause a clot to form on his brain and would result in his death. His conviction was that death was inevitable as a result of the blow. When it was proposed to take him to a sanitarium at Evansville and place him in charge of a surgeon he declared it was useless, as death was but a question of time, and declared the blow would kill him, and whilst he spoke of the blood clot and a trephine operation, and yielded assent to the wish expressed by others that he would recover, he still said that death would inevitably result. He was engaged to be married to a young lady whom he was aiding in procuring an education in music, and regretted that she would now have no one to aid her. He also expressed a desire as to the disposition of his effects. From the entire evidence we are satisfied that he had abandoned all hope of recovery

and absolutely believed that dissolution was near and inevitable, as a result of the injury he had received. His professional knowledge was such that he could diagnose his own condition, and the result shows that he did so with a greater degree of accuracy than the physicians, several in number, who were called to his aid. The evidence convinces us that he had abandoned hope shortly after his injury, and while in this condition he made the declaration with positiveness that he was struck by the defendant with a hard substance,—that the defendant rushed upon him and he received a blow. On several other occasions he declared that the blow was received at the hands of the defendant. We are of the opinion that the declarations made by Newton L. Fowler on these several occasions were admissible in evidence as dying declarations.

Plaintiff in error insists that the verdict is not supported by the evidence. Several witnesses testified that they heard a noise in the alley where Newton L. Fowler was struck and injured, and heard some one running immediately thereafter. The noise and running were heard not far from the hour of twelve o'clock. Witness Thomas Robinson testifies that he saw plaintiff in error go up the alley about twelve o'clock and shortly after return running down the alley. Newton L. Fowler, while conscious and awaiting death from the injury, made declarations to three or four different persons that he was struck with a hard substance by the defendant. The evidence was such as to clearly warrant the jury in finding the defendant guilty, and whilst, as is usually the case, there is a conflict in the evidence, it was a question for the jury, and it cannot be said that the verdict is not supported by the evidence.

It is urged that the court erred in giving the sixth instruction for the People, which was to the effect that whilst the defendant was a witness in his own behalf, yet in weighing his testimony the jury had a right to take

into consideration his interest in the result, and should apply all the tests applicable to any witness, and might "consider the interest he has in this case and the motive to swear falsely in his own behalf." The purpose of considering the interest of the defendant when he offers himself as a witness in the case is, that the jury may consider the influences which will affect his testimony. His interest is the motive which may influence his testimony, and whilst not technically accurate in its phraseology this instruction is not of a character to mislead the jury.

Objection is made to the twelfth instruction given for the People, because it states it was not material to prove where the deceased died, if it was shown he died from the effects of the assault. We have heretofore discussed this question, and deem it unnecessary to add to what we have said. This instruction was not error.

Objection is taken to the sixth and seventh clauses of the twenty-first instruction, which was as to the question of reasonable doubt. Without extending this opinion in the discussion of this question, we hold there was no error in giving the instruction.

The court gave for the defendant sixteen instructions as asked, and three were modified and given as modified. These instructions so given covered every phase of the case, yet it is urged the court erred in refusing instructions asked by the defendant. A careful examination of the refused instructions shows that those which were good are absolutely covered by other instructions given, and the one stating the place of death was necessary to be proven was properly refused.

We find no reversible error in the record, and the judgment of the circuit court of Hardin county is affirmed.

*Judgment affirmed.*

SERENA M. MARTIN

v.

JOSEPH FIELDING MARTIN.

*Opinion filed November 1, 1897—Rehearing denied December 14, 1897.*

1. JUDGMENTS AND DECREES—*when order of county court is a final, appealable order.* An order of the county court, in a proceeding to require an executrix to produce certain securities claimed by her but alleged to be part of the assets of the estate, finding that the securities are the individual property of the executrix, is a final order, from which an appeal lies to the circuit court.

2. WAIVER—*question of jurisdiction of person waived by general appearance.* Objection as to the jurisdiction of the person is waived by general appearance and defending on the merits.

3. PRACTICE—*section 41 of Practice act, concerning propositions of law, applies only to cases where jury is waived.* Section 41 of the Practice act (Rev. Stat. 1874, p. 780,) concerning propositions of law, applies only to cases where the parties are entitled to a jury trial but waive the jury and submit the case to the court by agreement, and does not govern any case which is to be tried by the court without a jury without requiring the consent of the parties.

4. SAME—*section 41 of Practice act does not apply to proceedings had under section 81 of Administration act.* On appeal to the circuit court from a proceeding begun in the county court under section 81 of the Administration act, (Rev. Stat. 1874, p. 118,) to compel a person to appear and be examined touching an alleged concealment of assets of an estate, propositions of law need not be submitted to preserve questions of law for review on appeal.

5. APPEALS AND ERRORS—*Supreme Court may review facts on appeal from proceeding under section 81 of Administration act.* A proceeding begun in the county court under section 81 of the Administration act, relative to concealed assets, is in the nature of a chancery proceeding, and the facts are open for review in the Supreme Court though the Appellate Court does not recite any finding of facts.

6. SAME—*when bill of exceptions is a proper mode of preserving evidence in chancery case.* A proceeding in the county court under section 81 of the Administration act, concerning concealed assets, is in the nature of a bill for discovery and relief, and the evidence heard in the circuit court on appeal therefrom may be preserved for review by the certificate of the judge in form of a bill of exceptions.

7. GIFT—*effect of donor's collecting interest on securities in possession of donee.* The temporary surrender of securities by the donee to the donor, for the purpose of collecting interest and making an exten-

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| 170 | 18  |
| 72a | 310 |
| 74a | 217 |
| 74a | 250 |
| 75a | 410 |

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| 170 | 18  |
| 80a | 265 |
| 80a | 374 |
| 81a | 641 |
| 81a | 643 |

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| 170 | 18  |
| 179 | 290 |
| 170 | 18  |
| 180 | 224 |

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| 170 | 18   |
| 89a | *91  |
| 89a | *157 |

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| 170 | 18   |
| 98a | *323 |

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| 170  | 18  |
| 101a | 642 |

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| 170  | 18   |
| 108a | *219 |

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| 170 | 18   |
| 208 | *832 |
| 204 | *888 |

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| 170 | 18   |
| 211 | *270 |

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| 170  | 18   |
| 118a | *167 |

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| 170  | 18   |
| 115a | *454 |

sion of time, does not affect the validity of the gift which the donor intended to be absolute, where the securities are again returned to the donee and retained in his possession.

8. SAME—*sufficiency of delivery to constitute a valid gift inter vivos*. The deposit of securities, transferable by delivery, by the owner in a safety deposit box rented by his niece, who carried the key and to whom he was under great obligations for services, accompanied by oral declarations and written memoranda that "everything in the box" was to be hers, that he "had no further claim" thereto and that he wanted his executors "to keep their hands off," constitutes a valid gift to the niece, although the uncle afterward took out and collected part of the securities and replaced them with others, and although, as to part of them, he had entered in his diary that his niece's ownership should be simultaneous with his death.

MAGRUDER, J., dissenting.

*Martin v. Martin*, 68 Ill. App. 169, reversed.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on writ of error to the Circuit Court of Kendall county; the Hon. C. W. UPTON, Judge, presiding.

ROBERT L. TATHAM, and HENRY S. WILCOX, for plaintiff in error:

Appeals lie only from final orders. Hurd's Stat. chap. 37, secs. 212, 226; chap. 3, sec. 123; *Leach v. Leach*, 50 Vt. 618; *Randolph v. People*, 130 Ill. 533; Woerner on Administration, sec. 545; *Ravatte v. Race*, 152 Ill. 672.

An order of the county court directing or refusing an inventory is not a final adjudication, but merely *prima facie* evidence. Hurd's Stat. chap. 3, secs. 51, 52, 56, 111; *Millard v. Harris*, 119 Ill. 199; *Leach v. Leach*, 50 Vt. 618; Gary on Probate Law, sec. 355; *Gold's case*, Kirby, (Conn.) 100; *Cameron v. Cameron*, 15 Wis. 1; *Willoughby v. McCluen*, 2 Wend. 609; *Hoover v. Miller*, 51 N. C. 79; Schouler on Executors, (2d ed.) secs. 235, 236; *Helton v. Briggs*, 54 Mich. 268; *In re Bell's Estate*, 25 Pa. St. 92; *Lynch v. Dwan*, 66 Wis. 490; *Simms v. Guess*, 52 Ill. App. 544.

The summary proceeding provided by sections 81 and 82 of the Administration act does not authorize a pro-

ceeding against an executor. *Simms v. Guess*, 52 Ill. App. 544; *Meinzer v. Bennington*, 42 Ohio St. 325.

Assets converted by an executor are assets administered. *In re Richard & Campbell*, 38 Ill. App. 94.

Upon the death of the testate the title to personal property immediately vests in executors. *People v. Brooks*, 123 Ill. 249; *Hickox v. Frank*, 102 id. 663; *Neubrecht v. Santmeyer*, 50 id. 78.

The summary proceeding provided by sections 81 and 82 of the Administration act is not the proper remedy to try contested rights and title to property. *Dinsmoor v. Bressler*, 164 Ill. 211.

The donee's possession is sufficient to prove a gift that the donor says he gives or has given. *Blake v. Jones*, Bailey's Eq. 141; Thornton on Gifts, 152; 8 Am. & Eng. Ency. of Law, 1319.

The donor need not put it out of his power to re-take or re-possess the thing given. *Grover v. Grover*, 14 Pick. 261; *Miller v. Meers*, 155 Ill. 298; Thornton on Gifts, secs. 209, 276; 8 Am. & Eng. Ency. of Law, 1351; *Chamberlain v. Williams*, 62 Ill. App. 423; *Otis v. Beckwith*, 49 Ill. 121.

Neither the county, circuit nor Appellate Court had jurisdiction or authority to try the title to the property in controversy in this probate proceeding. *Dinsmoor v. Bressler*, 164 Ill. 211.

HOPKINS, THATCHER & DOLPH, and N. J. ALDRICH, for defendant in error:

The findings of the Appellate Court on all controverted questions of fact are binding and conclusive upon the Supreme Court; and this rule applies not only to jury cases, but to cases submitted to the court without a jury. *Fitch v. Johnson*, 104 Ill. 111; *Bank v. LeMoine*, 125 id. 253; *Hardy v. Rapp*, 112 id. 359.

The same rule applies to proceedings under section 81 of chapter 3 of the Revised Statutes. *Steinman v. Steinman*, 105 Ill. 348; *Miller v. People*, 156 id. 113.



An affirmance of the judgment by the Appellate Court is the equivalent of a finding of the facts the same as the circuit court. *Alphin v. Working*, 132 Ill. 484.

The judgment of the Appellate Court is final, not only as to the principal or ultimate facts upon which the right of recovery is claimed, but also in respect to the evidentiary and subordinate facts. *Alphin v. Working*, 132 Ill. 484.

The Supreme Court cannot go behind the judgment of the Appellate Court and consider what inferences might arise from particular facts appearing in the bill of exceptions. *Alphin v. Working*, 132 Ill. 484.

By defending upon the merits all objections that could have been taken to service or want of service are waived. *Mix v. People*, 106 Ill. 429; *Dean v. Gerlach*, 34 Ill. App. 235; *Hercules Iron Works v. Railway Co.* 141 Ill. 495.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Edward Martin died at Red Hook, Dutchess county, New York, December 8, 1893, leaving a last will and testament, which was admitted to probate in the county court of Kendall county, in this State, December 14, 1893, and in which Samuel Beers, John O'Connor and the plaintiff in error, Serena M. Martin, were appointed executors. The executors qualified, and on March 5, 1894, filed their inventory of real estate valued at \$58,250, and personal property of the value of \$323,655.03, as property of the estate. On April 24, 1894, the defendant in error, Joseph Fielding Martin, one of the residuary legatees, filed his petition in the county court against the executors, alleging that the inventory was incomplete, and that the executors, or some of them, withheld and secreted certain mortgages, school bonds and street railroad bonds belonging to the estate. The petitioner prayed for a citation, and that the executors be required to inventory said property and give an additional bond. The citation was ordered and issued, and there was a hearing August 20,

1894, when the petitioner filed an amendment to his petition charging that plaintiff in error had in her possession certain notes, bonds, mortgages, school bonds, etc.,—the property of the estate which she claimed as her own property. He therefore prayed that she be required to bring the same into court and to abide the further order of the court. The executors, by their answer filed the same day, denied that they, or either of them, had withheld or secreted any property of the estate, or that they had in their possession, as executors, the mortgages, contracts and bonds in the petition mentioned. Upon the evidence adduced at the hearing the court found that the executors had inadvertently neglected to inventory \$40.25 cash, which they were directed to inventory, but held that the mortgages, school bonds and street railroad bonds mentioned in the petition were not a part of the estate of the said Edward Martin, deceased, and were the individual property of the plaintiff in error. From this order the petitioner appealed to the circuit court.

On the hearing in the circuit court the executors moved to dismiss the appeal because the order appealed from was not final, and, the motion being overruled, they excepted. Plaintiff in error also protested that she was not in court in her individual capacity, and that the court had no jurisdiction to try the issue against her. The court reserving his decision, she filed her answer denying the jurisdiction so far as her personal interest was concerned, and also denying that the property described in the amended petition was the property of the estate, and claiming it as her individual property. The court held that he had jurisdiction, and found that all the securities in dispute belonged to the estate, and ordered plaintiff in error to turn over the same, with all moneys collected thereon, to the executors, to be accounted for under the direction of the county court. Plaintiff in error sued out a writ of error from the Appellate Court for the second district, where, on a review of the record, the order was

affirmed, except as to what were called "the Illinois farm mortgages," amounting to \$50,200, as to which it was reversed, and the cause was remanded with directions to enter an order finding the same to be the individual property of plaintiff in error. The record of the Appellate Court is now brought here, with assignments of twenty-nine errors by plaintiff in error and fourteen cross-errors by defendant in error, Joseph Fielding Martin.

It is first contended by plaintiff in error that the motions made in the circuit court to dismiss the appeal should have been sustained, because the order of the county court appealed from was not a final order, and because the court had not acquired jurisdiction to adjudicate upon her individual rights. The argument upon that question proceeds upon the mistaken assumption that the proceeding in the county court was merely for the purpose of correcting an inventory alleged to be incomplete, in which the court would retain a continuing jurisdiction over the executors until the final settlement of the estate. The petition as first filed was of the character claimed, and set out a large amount of securities which it was alleged that the executors, or some of them, had withheld from the inventory, and also prayed that the executors should be required to file a supplemental or amended inventory containing the same. Plaintiff in error was cited with the other executors, and appeared in that proceeding. When the hearing on that petition commenced, August 20, 1894, the sworn amendment to the petition was filed charging that plaintiff in error had possession of the securities and claimed them as her property, and praying that she be required to bring them into court and should abide the further order of the court. This was a change of the proceeding to correct the inventory against the executors generally to one against plaintiff in error individually, under sections 81 and 82 of the Administration act. The hearing proceeded from day to day under this amended petition until August 22, 1894, when the order of the court

was entered. The proceeding under these sections is to a large extent informal. No provision is made for an answer, or any pleading further than a statement upon oath, and no formal particularity is required to give the court jurisdiction. (*Blair v. Sennott*, 134 Ill. 78.) Plaintiff in error, against whom the amended petition was directed, did not formally answer the charge against her, but there was a hearing before the court where she was represented, and she succeeded in establishing her claim to the individual ownership of the securities. In the final order the county court required the executors to inventory \$40.25, which was a trifling matter compared with the issue between petitioner and plaintiff in error, and that issue was decided in her favor. The order found that the securities were not property of the estate, but were her individual property. That was the end of the proceeding and a final determination of the issue raised by the amended petition, so far as the county court was concerned. The order was a final one, from which an appeal could be taken.

After the appeal to the circuit court a stipulation to take depositions was signed by attorneys for plaintiff in error in her personal right, and service of numerous notices was acknowledged in the same way. At the hearing in the circuit court she appeared, answered and defended in her individual right, although protesting against the jurisdiction. The protest was not against the jurisdiction of her person,—and it would have made no difference if it had been, since any objection of that kind was waived by the entry of a general appearance and defending on the merits. (*Hercules Iron Works v. Elgin, Joliet and Eastern Railway Co.* 141 Ill. 491; *Mix v. People*, 106 id. 425.) The protest was against the power of the court to try the issue, and therefore related to the subject matter. It was unfounded, as the county court acquired jurisdiction of the subject matter by the amended petition.

There are some questions of practice which relate both to the errors and cross-errors assigned, and as the deci-

sion on those questions will dispose of a large part of the argument on each side they will be considered together.

In the circuit court both parties submitted written propositions under section 41 of the Practice act, to be held as law in the decision of the case, and the argument for plaintiff in error is largely devoted to the action of the court in refusing and modifying propositions so submitted by her and in holding propositions submitted by the petitioner. There is also an argument on the facts in her behalf. In the Appellate Court the order of the trial court was reversed in part and the cause was remanded, with directions to enter a specific order different from the one reversed, but the Appellate Court did not recite in its judgment any finding of fact concerning the matter in controversy different, either wholly or in part, from the findings of the trial court, as provided in section 87 of said Practice act. It is therefore argued for defendant in error, that the Appellate Court, not having recited any facts in its final judgment, is presumed to have found them the same as the trial court; that the judgment of the Appellate Court conclusively settles the facts according to the findings of the trial court; that not finding the facts different from the trial court, it could not reverse the judgment in whole or in part, and that therefore the partial reversal was erroneous. Both parties, to sustain these alleged errors, rely upon the Practice act as governing the proceeding.

Section 41 of the Practice act provides, that in all cases where both parties agree that both matters of law and fact may be tried by the court, either party may submit written propositions to be held as law in the decision of the case, and either party may except to the action of the court in passing upon them. The section only applies to those cases where the parties are entitled to a trial by jury, which right they may waive and submit their controversy to the court. It is indispensable that the parties should agree to a trial of the cause by the court without

a jury to enable the court to proceed under that section. (*Hermann v. Pardridge*, 79 Ill. 471.) It does not govern any case which is to be tried by the court without the intervention of a jury, in the absence of agreement or consent by the parties.

Questions as to the relations of the Practice act to proceedings under the sections of the Administration act now under consideration have been before the court with the following results: *Steinman v. Steinman*, 105 Ill. 348, was such a proceeding, and the court refused to consider controverted questions of fact, holding that the judgment of the Appellate Court settled them, and also holding that as no propositions of law were submitted there was no question for decision. In *Blair v. Sennott*, *supra*, (a like proceeding,) it was considered that the Practice act did not apply to such proceedings in the county court, and it was said (p. 84): "There is no mode by which the evidence given in a proceeding before the probate court can be lawfully preserved and made a part of the record." In *Miller v. People*, 156 Ill. 113, the court declined to decide the question whether either party could insist upon a trial by jury, saying that if the right was conceded to exist it had been waived, but did, in effect, hold that there was such a right by following *Steinman v. Steinman*, *supra*, and decided that nothing was presented for review because no written propositions of law were submitted to the trial court and the decision of the Appellate Court had conclusively settled the facts. But in *Dinsmoor v. Bressler*, 164 Ill. 211, the purpose of the sections of the Administration act in question and the cases to which they were applicable were explained, and it was held that the parties were not entitled to a trial by jury. It was there said (p. 222): "If sections 81 and 82 could be used to settle contested rights to property as between executors and administrators on the one side and third persons on the other, they would operate as an infringement upon the constitutional right to trial by jury, as they contain no

provision for a jury trial." The *Steinman* and *Miller* cases were not referred to, but they were practically overruled by that decision, which we think must be conceded to be correct.

A proceeding of this nature in the county court sitting in probate was unknown to the common law, and jurisdiction in cases involving such questions was vested in ecclesiastical or chancery courts, which had no jury. Although county courts are without general chancery jurisdiction, yet in probate matters they have jurisdiction of an equitable character and may adopt the forms of equitable proceedings. (*Moore v. Rogers*, 19 Ill. 347; *Dixon v. Buell*, 21 id. 203.) In the case of a guardian's report made under the order of the county court it was said: "As the proceedings before the probate court are likened to proceedings in chancery, this may be likened to a bill for discovery against the guardian, wherein it is necessary to sift his conscience, and to get at facts of which he alone could have any knowledge." (*Gilbert v. Guptill*, 34 Ill. 112.) The case of *Heward v. Slagle*, 52 Ill. 336, involved the settlement of an account of administrators, and the court said (p. 340): "We take occasion to say, in a case of this kind the probate court should, on the trial of it, proceed as though a bill in chancery had been filed, hear the evidence and investigate the account without the intervention of a jury, unless it should appear to be necessary to impanel a jury to try some issue of fact that may be made up, as in ordinary chancery cases." *In re Steele*, 65 Ill. 322, was a proceeding to compel guardians to account, and it was said that the citation to account was not a suit at law but the exercise of a summary power conferred by the statute, which was likened to a bill in chancery.

The sections now under consideration were substituted for section 90 of the Statute of Wills, which was of the same nature. It was said of that statute that its purpose was to enable executors and administrators, and parties having an interest in an estate, to discover assets, and

to enable the court to compel the person charged with having the property, to discover, on oath, whether he had property of the estate in his possession. (*Wade v. Pritchard*, 69 Ill. 279.) In *People v. Abbott*, 105 Ill. 588, it was held that, even if it were proved that property of the deceased was in the possession of another party, the court, in the summary proceeding provided for in the Administration act, is not bound to order it delivered to the executor or to make any specific order, but is vested with discretion, and should look beyond the mere legal right and protect equitable rights. In such a case of the exercise of equitable jurisdiction and discretionary powers a party is not entitled to a trial by jury.

As there was no right to a jury trial, section 41 of the Practice act does not govern, and it was not necessary to submit propositions of law. As the proceeding is governed by equitable principles and practice, the facts are still open to investigation in this court, and it was not necessary that the Appellate Court should recite in its judgment a finding of facts. The sections of the Practice act relied upon do not apply to cases of this kind. *Moore v. Tierney*, 100 Ill. 207.

Plaintiff in error claims the securities as a gift from Edward Martin in his lifetime, and she insists that the court could not, under this statute, try the question of her ownership of them. The primary purpose of the statute is to discover assets of estates, and the court is authorized to make such order in the premises as the case may require. The statute is not designed to afford the means of collecting debts due to estates, (*Williams v. Conley*, 20 Ill. 643,) nor to try contested rights and title to property between the executors and others. (*Dinsmoor v. Bressler*, *supra*.) The mere fact that one party to the controversy is an executor will not justify depriving the other party of a trial by jury or authorize his imprisonment, but in a proper case the court may order the property or effects to be delivered up, or the proceeds or value thereof in



case the same has been converted. It might be a proper order to direct executors to resort to some other court having jurisdiction to enforce the rights of the estate, but in a case where some trust relation exists, or there is any other condition authorizing the court to order a delivery of the property and enforce obedience to its order by imprisonment, the court may make such an order. *Blair v. Sennott, supra*, was such a case, where it was held that the agent was not the debtor of his principal, but his trustee, and the order that he should deliver moneys in his hands as such trustee was sustained. In this case the plaintiff in error, who was proceeded against, is one of the executors, and could not be both plaintiff and defendant in a suit at law. If she held property, claiming the same as her own, which belonged to the estate being administered under the jurisdiction of the county court, and of which she was one of the executors, the relation afforded ground for an equitable proceeding against her. It is one of the cases where the court may properly order a surrender of property, and enforce a duty owing by the trustee in the manner provided by the statute.

The evidence of the respective parties taken before the circuit court was duly preserved by the certificate of the judge, under the form of a bill of exceptions, which is the equivalent of a certificate of evidence, and a proper mode of preserving the evidence in chancery causes in that court. As the proceeding was in the nature of a bill of discovery and for equitable relief, it was proper to so preserve the evidence for the purpose of review.

The securities in controversy were in the possession of the plaintiff in error at and before the death of Edward Martin, and there is no question whatever but that he intended to give them to her and fully supposed that he had made a valid gift of them to her. The facts showing his intention, and the gift as he understood it, are as follows: He lived on a farm at Red Hook, New York. She was his niece, and went to live with him and help look

after his home when she was nine years old. He lived to be eighty-three years of age and she resided with him about forty-eight years. Until about fourteen years before his death, his sister, an aunt of plaintiff in error, also made her home with him and had charge of the place during his absence, but she then died, and after that time plaintiff in error took full charge of the home. While she so lived with him she did all kinds of work about the house, milked cows and made garden, and only had assistance in later years when failing health required it. She was not only his servant, but in later years, at least, was also his companion. In his old age she went with him on his journeys and attended him in the winters while sojourning in Florida. He regarded her with great affection, fully appreciating what she had done for him, and, being a very wealthy man, expressed his intention to make ample provision for her and to give her sufficient property to make her independent. He deeded her the home farm at Red Hook, and on June 20, 1890, went to the Poughkeepsie National Bank with her, where she rented box 65 in the safe deposit vault and paid the rent for it. He then made the following entry in his diary: "June 20, 1890.—Went to Poughkeepsie with Serena M. Martin. She rented box 65 in Pok. S. D. vault and pd. \$7.50 to Jan'y 1, '92. I put ten street R. Co. bonds, \$1000 each, in her box, being a delivery to Serena of the bonds now but her ownership to them to be simultaneous with my death." Under date of November 21, 1890, he recorded in the diary that he "put \$11,000 of school bonds in Serena M. Martin's box, No. 65, for her. \* \* \* I also told cashier Cornwall that I had put securities in my niece's box and that they thereby became her property,—that I had no claim upon the contents of her box and didn't want any other fellow to have." On December 13, 1890, he wrote the following letter, which he put in the safe deposit box with directions to her to open it after his death:

"RED HOOK, N. Y., December 13, 1890.

"*Miss Serena M. Martin:*

"MY DEAR NIECE—I have placed in your box in safe deposit vault in Poughkeepsie National Bank certain bonds, securities, deeds, bills of sale, etc., which I have given to you and delivered to you, and I write this that there may be no doubt of the fact that everything in your box is yours absolutely. Judge Taylor, of Poughkeepsie, and George Cornwall, cashier of the Poughkeepsie National Bank, have knowledge of my intentions, as above.

"Your affectionate uncle,

EDWARD MARTIN."

On April 15, 1892, he wrote in his diary: "Took Serena to S. D. vault and she cut the coupons from Minnesota State bonds." On October 11, 1892, he records that he put "three mortgages and notes by the Catholic Bishop of Chicago, aggregate \$25,000, in Serena M. Martin's box in safe deposit vault in Poughk. N. Bk." The plaintiff in error kept box 65 in the safe deposit vault until it became too small for her needs, when she rented box 82 at eight dollars per year, and we find this fact recorded by Edward Martin in his diary under date of December 10, 1892: "Went to Poughkeepsie with my niece and put ten notes and mortgages in Serena's box 82, and she gave up 65, it being too small for her papers." In his entry under date of May 3, 1893, he wrote that he "also put two notes of H. Phipps, Jr., [\$100,000] in S. M. Martin's box." His last entry of this nature is under date of June 14, 1893, where he says that "Serena put Ill. farm mortgages and notes in her box, and I took Phipps, Jr., notes and certificates of deposit in Ill. Tr. & Sv. Bank and Am. Tr. & Sv. Bk. from the box to take to Chicago." On May 13, 1892, he wrote a letter, which was also put in the box to be opened after his death, directed to her, in which he told her about his will and certain securities then in the box, amounting to \$55,000, saying that they were her private property as well as the homestead and an equal share of his residuary estate with the legatees named in his will, in which he gave her two of the forty-two shares into

which it was divided. He also gave her advice about guarding her property and gave the names of the banks with which he had accounts. This letter was opened and an addition made December 15, 1892, as follows: "Some of the bonds [\$30,000] named above as in your box have matured and been collected, and assignments of other notes and mortgages than those before named will be added to your personal estate from time to time, at my convenience, and placed in your box in the safe deposit vault, and everything in your box is yours.—Edward Martin." In June, 1893, he told Samuel Beers, one of his executors, at a meeting in Chicago, at a time when he went with plaintiff in error and others to the World's Fair, referred to in the diary entry of that date, that he had provided for Serena; that he had deeded the farm at Red Hook to her; that he had provided for her otherwise; that he had given her more than she could reasonably spend; that the best of his securities were getting into Serena's box, and that she had a box in Poughkeepsie in her own name and carried the key. In November, 1893, about a month before his death, he again told Beers that he had put personal property in Serena's box which was her property, belonging to her; that it was no part of his personal estate, and that he wanted his executors to keep their hands off of it. He shook his head in his own decided way and said, "I mean what I say now." He also told Margaret J. Martin, just before his final sickness, that Serena had done her share and more than her share, and that he intended she should spend the remainder of her days with comfort, without work.

The securities, with the exception of the Illinois farm mortgages, which the Appellate Court held were the property of the plaintiff in error, were in this safety deposit box at the death of Edward Martin. She had the key, and had had it from the time that the first box was rented, with absolute control over the box and its contents. The Illinois farm mortgages were also in her possession be-

fore and at the death of Edward Martin, wrapped up in a piece of curtain calico and kept in a closet in her room. With them were duly executed assignments of them to her. The securities were two notes of H. Phipps, Jr., \$100,000, secured by mortgage; street railway bonds, \$10,000; school bonds, \$7000, and Illinois farm mortgages, \$50,200, amounting in all to \$167,200, all in her possession, either transferable by delivery or assigned to her.

It is insisted that this possession was not evidence of ownership, because all the securities belonging to the deceased were also in her possession. But this does not accord with the evidence. He had what he called the "rat-proof box," which was kept in the closet of his bedroom, where other securities were kept. It was locked with a combination lock, and the evidence shows that whenever it was opened and she was present he was also there, and that he had entire control of it. The letter of May 13, 1892, put in the safe deposit box to be opened after his death, gave her the combination by which his box could be opened, as follows: "To open 'rat-proof' place letters C. A. C. O. in line of the notches on the lock and you can draw it out and open it." His property was in his home when he died, and the most that can be said of any of it is, that it was accessible to her and she might have purloined it, but there is not a shadow of suspicion that she did so. It is proved, beyond question, that the mortgages in the calico wrapper had been delivered to her and under her control for some time before his death, and if he wanted to see them he asked for them and re-delivered them to her. The securities in the safe deposit box were transferable by delivery. The box was hers and she had the keys, and if a coupon or paper was ever given to him for any purpose she got it for him. He could not get one of them except by her giving it to him. Any security that was in the box and now in controversy, that had been handed him for any purpose, had been returned to her.

It is argued that deceased intended a testamentary disposition of the securities, which would be void because the forms required by the Statute of Wills were not observed. This argument is based upon the facts that he collected interest as it matured, up to the time of his death; that he executed an extension in his own name of the Phipps notes and mortgage for \$100,000, and that the diary entry concerning the street railroad bonds, and a notation of transfer on each bond, showed that the gift of such bonds was to take effect at his death. He did collect the interest,—and this applies equally to the Illinois farm mortgages and to the securities in the box. Although he had executed and acknowledged formal assignments of those mortgages, she gave them to him and he collected the interest, and also collected interest on the securities in the box and returned them all to her. There is no evidence under what arrangement or with what understanding between him and her this was done, but we do not regard the fact as sufficient to overcome the evidence of an absolute and irrevocable gift. He had previously done all that was necessary, in law, to invest her with an absolute legal title, and again returned them to her. Aside from the street railroad bonds, we do not see how he could, in the face of his acts, statements and diary entries, have asserted any title to the property as against her, nor, if she had died, how he could have reclaimed them from her heirs. He was a thorough business man and the head of the household, and the fact that she gave coupons or securities into his possession, and that he collected interest or executed the extension in his own name, may as well be attributed to the relations of confidence, love and respect existing between them, and her wish that he should attend to the business, as to any understanding between them that the transaction was in fact different from what it purported to be, or an acknowledgment on her part of any title in him. Even if he mistook the effect of his acts, and believed that he could still

control the property after the transfer to her, that would not change the actual character of the transaction, as counsel seem to suppose. Neither he nor his heirs could be heard to say that a man of his business experience and ability did not intend the legal effect of what he had done.

Deceased told Beers that he would find in his inventory book a list of his property from which to make an inventory. On that book these securities, with others, were listed; and as to the Illinois farm mortgages, with one exception there was a note, "Assigned to S. M. Martin," but as to the other securities there was no such notation. This is pressed as a fact of much importance showing that they had not been given to her; but it must be remembered that in the same conversation he said to the same witness that the securities in her box were no part of his estate, and that he wanted his executors to keep their hands off of them. Taken in connection with this statement, the failure to note on the inventory book the gift of part of the securities to her is of trifling weight, and especially in view of the fact that as to one of the mortgages of which he had executed and acknowledged an assignment to her there was no note of the fact. The other securities did not require assignments, and the notation may have been made because of the formal transfer. Even then it was omitted in one instance.

The diary entry on the day that the safe deposit box was rented shows that the street railroad bonds were then put in the box, followed by the statement, "being a delivery to Serena of the bonds now but her ownership to them to be simultaneous with my death." There are subsequent entries and numerous statements of a present gift of all the securities in the box, but there was on each of the ten bonds a note of transfer indicating a life estate in Edward Martin, with a remainder to Serena M. Martin after his death. The bonds provided for registration in the owner's name on the company's books, the registry

being noted on the bond, and for the transfer of registered bonds by the registered owner to be also noted on the bond. There is no note of a registration on these bonds, but there is a note of transfer: Under "Date of transfer" appears, "Jan. 20, 1885," and under the title "To whom transferred" is the following: "Edward Martin, or Serena M. Martin at his death.—W. H. Lupp, Sec'y." There is no evidence who made this minute on these bonds, but in form it appears to have been written by W. H. Lupp. Who he is does not appear or for what company he was secretary. The only meaning that can be given to it is, that there was a transfer of the bonds to Edward Martin for life and to Serena M. Martin at his death; and such a transfer is not void, as against the Statute of Wills, in the case of real estate, (*Harshbarger v. Carroll*, 163 Ill. 636,) and we do not see why it should be in the case of personal property. An estate for life in one may be created in personal property with remainder to another. 6 Am. & Eng. Ency. of Law, 883.

The reason for putting the letters in the box to be opened after his death only appears by inference. They were explanatory, and the longer one also of an advisory nature. There had been a delivery and acceptance of whatever was in the box, and the letters would not serve to overcome the gift thereby completed.

The judgment of the Appellate Court, so far as it affirms the order of the circuit court, is reversed and the cause is remanded to the circuit court, with directions to enter an order in accordance with the views herein expressed, finding that the property in controversy is the individual property of plaintiff in error and for the delivery of the same to her.

*Reversed and remanded.*

Mr. JUSTICE MAGRUDER, dissenting.



## WILLIAM WINKELMANN

v.

## THE MOREDOCK AND IVY LANDING DRAINAGE DISTRICT.

*Opinion filed November 8, 1897—Rehearing denied December 9, 1897.*

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| 170  | 37   |
| 170  | 59   |
| 170  | 264  |
| 170  | 37   |
| 52a  | 629  |
| 170  | 37   |
| 112a | 1645 |

1. DRAINAGE—commissioners cannot create indebtedness in advance of assessment. Levee and ditch commissioners have no power to create an indebtedness in advance and then levy an assessment for the purpose of meeting such indebtedness.

2. SAME—power of commissioners to levy assessments under the constitution. The power of levee and ditch commissioners to levy assessments under section 31 of article 4 of the constitution is confined to assessments for the construction of levees, drains and ditches, and for the repair of those already constructed; and the aggregate amount of all assessments cannot exceed benefits.

3. SAME—commissioners cannot levy assessment to pay "outstanding" liabilities. An assessment by levee and ditch commissioners to pay "outstanding obligations of the district" cannot be sustained where there is nothing in the record to show the amount, nature and character of such liabilities.

APPEAL from the County Court of Monroe county; the Hon. WILLIAM P. EARLY, Judge, presiding.

This is an appeal from a judgment of the county court of Monroe county, confirming an assessment roll made by the three commissioners of the Moredock and Ivy Landing Drainage District No. 1 in said county. The petitioners filed their petition in the county clerk's office of said county on the 15th day of August, 1895, alleging, that the said district was duly organized for drainage purposes, giving the boundaries thereof, and representing that the ditch theretofore dug in said district had been of great benefit to the lands therein, but that, by reason of the inability of the petitioners to collect a large portion of the assessments and repair taxes theretofore levied against the lands therein, they were unable to keep the ditches free from drift-wood and dirt, so that the ditches became filled up and would not drain the lands; and further alleging, that, in order to drain said lands the boundaries

of which are given in the petition, it will be necessary to do certain work and dig a certain ditch. The petition sets forth that, when the proposed work shall have been done, the ditches will drain the lands in the district. With the petition are filed a plat and profile, and an estimate of the cost of the proposed work, and an itemized statement of accounts, showing the moneys received and the manner in which such moneys have been expended. The petition further represents, that on July 17, 1883, an assessment was made for drainage purposes against certain described lands, payable in installments in 1884, 1885, 1886, 1887 and 1888, and that repair taxes were regularly levied against said premises payable in 1885, 1886 and 1888, and that certain amounts remained unpaid against said lands on account of said assessment, repair taxes and interest. The petition alleges, as to some of the lands upon which assessments remained unpaid, that they were therein wrongly described by mistake. The petition further represents, that there are outstanding liabilities of the district, amounting to \$25,840.59; that the commissioners have no funds to pay the same, except said taxes and assessments levied against said lands as aforesaid, amounting to \$. . . . .; that the owners of the delinquent lands claim, that the taxes and assessments so levied against them are void by reason of mistakes in describing the same, want of proper notice to owners thereof, and other irregularities of proceeding not affecting the merits of said taxes and assessments; that, by reason thereof, the commissioners have been unable to collect any part of said taxes and assessment. The petition further represents, that an assessment of \$51,340.59 is necessary to be levied upon the lands described in the petition, and upon all the lands in the district, \$25,500.00 of which is needed to complete said work, and \$25,840.59 of which is needed to pay the outstanding liabilities of said district. The petition prays, that the assessment may be made accordingly, and that, in making the same,

said prior assessment against said delinquent lands be not lost to the district, but that the same may be considered and included in said assessment.

The appellant and three others answered the petition, denying substantially all the allegations thereof.

On December 12, 1895, the county court ordered, that an additional assessment of \$51,340.59 be levied upon the lands in said district, as prayed for in said petition; and that the descriptions of lands assessed, which were imperfect or inaccurate, be corrected, and that the assessment be made against the lands by proper descriptions. The appellant asked, that a jury might be sworn to make the assessment; but it was ordered, that the commissioners of the district make the assessment in lieu of a jury, and that the commissioners, in making the same, consider the prior assessments, which are void and unpaid as set forth in the petition, and that they may include the same or any part thereof with the assessment ordered. Thereupon the appellant filed objections to the confirmation of the assessment as to the lands therein described belonging to him. Such of these objections as are material to the case are mentioned in the opinion. The objections were heard by the county court, and evidence was introduced upon the issues formed. The court overruled the objections, and confirmed the assessment roll as above stated.

JOSEPH W. RICKERT, and WILLIAM WINKELMANN, for appellant.

TRAVOUS & WARNOCK, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The former assessment, made on July 17, 1883, by the commissioners of the district, amounted to more than \$41,000.00, and is the same assessment, which is referred to and more particularly described in the cases of *Gauen*

v. *Drainage District*, 131 Ill. 446, and *People v. Rickert*, 159 id. 496. No new assessment has been made since 1883, but a repair tax has been assessed since that time. The prior assessment of 1883 and the repair taxes together amount to \$42,579.08. The record shows, that, of the latter amount, \$32,270.97 has been collected and expended; and that, besides said amount, \$4645.82 has been borrowed. Thus the total amount received is \$36,916.79. It thus appears, that \$10,308.11 of the original assessment of 1883 remains uncollected. The present assessment, which is additional to the assessment of 1883, and amounts to \$51,340.59, consists of two amounts, to-wit: the sum of \$25,500.00, which is alleged in the petition to be needed to complete said work, and the sum of \$25,840.59, which is alleged in the petition to be needed to pay the outstanding liabilities of said district.

We are unable to find any authority in any of the drainage district acts, authorizing the levy of an additional assessment for the purpose of paying the outstanding liabilities of the district. This petition is filed under section 37 of the act of May 29, 1879, in regard to drainage districts. (2 Starr & Cur. Stat.—2d ed.—sec. 37, chap. 42, p. 1519). Section 37 provides, that “assessments from time to time may be levied on the land within any district, when it shall appear to the court, that the previous assessment or assessments have been expended or are inadequate to complete such work, or are necessary for maintenance and repair, or when it shall become necessary for the construction of any additional work, or the completion of any work already commenced within any drainage district to insure the protection or drainage of the lands in said district, under the order and directions of the court, \* \* \* on the petition of the commissioners, accompanied by an itemized statement of accounts made by the commissioners, under oath, showing the moneys received by the district and the manner in which they have been expended, together with plats, profiles of such

additional work and estimated cost of the same." So far as the sum of \$25,500.00, included in the assessment, is concerned, the assessment of that amount may be, and is conceded to be, justified by the terms of section 37. It is true that section 18 authorizes the inclusion of the prior assessment in a new assessment against the lands when such prior assessment is void and unpaid on account of some mistake or omission not affecting the merits of the assessment. There is nothing, however, to justify the assessment for the whole of the sum of \$25,840.59, alleged to be the amount of the outstanding liabilities of the district. Even if \$10,308.11, the amount remaining unpaid upon the original assessment, be regarded as a part of the sum of \$25,840.59, and be taken out of the same, there would still remain the sum of \$15,532.48, as representing amount of alleged outstanding liabilities of the district.

We discover nothing in the record which explains the nature of these liabilities. The only testimony upon the subject, to which our attention has been called, is that of one of the commissioners, named Jacob Maeys, who says: "I was one of the commissioners at the organization; I know some of the creditors of this district; the district owes me \$1500.00; and Mrs. Kahn about \$1600.00; the Rices \$16.00; Mette & Canne I do not know just how much; Nasse & Fink told me they had \$5000.00 on judgment; I do not know that I can point out anybody else; I am the owner of about four hundred acres of land in this district." According to the testimony of this witness, the indebtedness amounts, so far as he gives any definite information on the subject at all, to about \$8116.00. And yet the assessment is levied for more than \$15,000.00, considered upon the basis of a deduction of the unpaid part of the previous assessment. If, under any circumstances, an assessment can be made for the purpose of paying outstanding liabilities, it should not be made where the proof as to the amount and character of such liabilities is so indefinite, as it is in this record.

But, aside from the indefiniteness as to nature and amount thus referred to, the statute seems to provide a particular mode, in which alone the district is authorized to incur any indebtedness. Section 36 provides, that the commissioners may do all acts that may be necessary in and about the surveying, laying, constructing, repairing, altering, enlarging, cleaning, protecting and maintaining any drain, ditch, levee or other work for which they have been appointed, including all necessary embankments, protections, dams and side drains, clearing out and removing obstructions from natural or artificial channels or streams within or beyond the limits of the drainage district, procuring or purchasing riparian rights by agreement with the owners thereof; and it, at the same time, provides that the commissioners "may use any money in their hands arising from assessments for that purpose." By section 36 the commissioners are thus limited to the use of money in their hands, arising from assessments, for the purpose of accomplishing the objects therein mentioned. Section 37 also provides, that the commissioners may use money, arising from the collection of assessments, or coming into their hands as such commissioners, for the purpose of compromising suits and controversies arising under the act, and in the employment of all necessary agents and attorneys in organizing the district, and for conducting other proceedings in law or equity for the same, and for the purpose of constructing or repairing or maintaining any ditch, ditches, etc., within the district, or outside of the district, necessary for the protection of the lands and complete drainage of the same within the district. Here, again, the limitation in the use of money is to such money as arises from the collection of assessments. Section 38 provides, that the commissioners may borrow money, not exceeding ninety per cent of the amount of assessment unpaid at the time of borrowing, for the construction of any work which they shall be authorized to construct, or for the payment of any in-

debtedness they may have lawfully incurred under the provisions of the act.

These provisions of the act clearly indicate, that the commissioners have no power to contract debts over and above the amount of the assessment. According to the allegations of the present petition, the indebtedness, for which it is sought to levy the assessment, largely exceeds the whole amount of the original assessment of 1883, and, by consequence, exceeds the amount of the unpaid portion of said former assessment. The commissioners have no power to create the indebtedness in advance, and then levy an assessment for the purpose of meeting it. This is so, because the property owners have a right to be heard as to any act of the commissioners materially affecting the character or extent or cost of the improvement. (*Badger v. Inlet Drainage District*, 141 Ill. 540). The prohibition against the contracting of the indebtedness before the making of the assessment to pay it is further apparent from the fact, that the only mode indicated in the statute, by which an indebtedness may be created, is the borrowing of a certain percentage of the amount of assessment unpaid at the time of borrowing. Necessarily, therefore, the assessment precedes the contracting of the indebtedness. To create an indebtedness the means provided by the statute are the only means which can be resorted to. Inasmuch, therefore, as the provisions of the statute imply a want of power in drainage districts to create debts in excess of assessments or funds on hand, at least \$15,532.48 of the \$25,840.59, included in this assesment, can by no possibility be a lien on any of the lands in the district, and hence cannot be enforced against appellant's land. (*Comrs. of Havana Township v. Kelsey*, 120 Ill. 482).

Section 31 of article 4 of the constitution provides, that the corporate authorities of these drainage districts may be vested by the legislature "with power to construct and maintain levees, drains and ditches, and keep in repair all drains, ditches and levees heretofore constructed

under the law of this State, by special assessment upon the property benefited thereby." Under this constitutional provision, the aggregate amount of all assessments, including the original assessment and all subsequent ones, must not exceed the benefits to the property assessed. (*Comrs. of Havana Township v. Kelsey, supra*). Not only is this so, but no special assessment can be levied by such a drainage district for any other purpose than for the purpose of constructing and maintaining levees, drains and ditches and keeping in repair all drains, ditches and levees already constructed. It does not appear, that an assessment levied for the purpose of paying the outstanding liabilities of a district, without any definite information as to the amount, nature and character of such liabilities, has in view an object, which comes within the limited purpose specified in the constitution.

For the reasons stated we are of the opinion, that the judgment of the court below, confirming the present assessment, was erroneous. Accordingly the judgment of the county court is reversed and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

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V. H. GIBSON *et al.*

*v.*

THE SAFETY HOMESTEAD AND LOAN ASSOCIATION.

*Opinion filed November 8, 1897—Rehearing denied December 14, 1897.*

1. LOAN ASSOCIATIONS—*members withdrawing from insolvent association not entitled to priority.* Members giving notice of withdrawal from an insolvent loan association are not entitled to priority of payment over fellow-members.

2. SAME—*holders of paid-up stock cannot seek advantage by repudiating its validity.* Holders of paid-up stock in an insolvent loan association are estopped, by participation in the transaction, to repudiate

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| 80a | 311 |
| 80a | 467 |

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the validity of their stock, and seek a preference as creditors of the association to the extent of the money paid therefor.

3. *SAME*—holders of paid-up stock not entitled to be charged with dues and preferred as to excess. Holders of paid-up stock in an insolvent loan association are not entitled to be charged with monthly dues upon the stock from the time of its issue, so as to place themselves, as to that amount, upon equal footing with other stockholders, and as to the excess be declared preferred creditors and paid in full.

*Gibson v. Safety Homestead and Loan Ass.* 69 Ill. App. 485, affirmed.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Montgomery county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

HOWETT & JETT, and JAMES M. TRUITT, for plaintiffs in error.

LANE & COOPER, for defendant in error.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the Third District confirming an order of distribution in the circuit court of Montgomery county in the matter of the Safety Homestead and Loan Association. The order of the circuit court is as follows:

"The court, finding from reports of John J. McLean, receiver, that there is sufficient money in the receiver's hands to pay a dividend of twenty-five per cent to shareholders and still leave enough money in the receiver's hands to pay taxes and other expenses of administration of the said estate, orders, adjudges and decrees that the receiver pay a dividend of twenty-five per cent to all shareholders of said association in the following manner: First, receiver is ordered to pay, from any money in his hands as receiver, a dividend of twenty-five per cent among all shareholders, irrespective of withdrawals or of paid-up stock, as follows: The principal sum upon which dividends shall be paid to holders of common stock shall be the total amount of monthly installments paid by the

several shareholders of such stock, with six per cent interest on the several installments, computed according to the average time of monthly payments from date of payment to April 23, 1895; second, the principal sum on which dividends shall be paid shareholders of paid-up stock shall be the total amount paid by the several shareholders of such stock, with six per cent interest from date association failed to pay six per cent interest on said stock to April 23, 1895; third, borrowing shareholders shall be credited with amount of dividends payable on their shares when they pay off their loan to said receiver, but the credit shall be as of the date when dividends are paid to non-borrowing shareholders; fourth, receiver shall only pay dividends to persons by stock books, as owners of stock on which dividends are paid; fifth, dividends shall only be paid upon presentation of certificates of shares to receiver at time dividends are paid, for endorsement or credit thereon of amount paid."

Two objections are urged against this order: First, that it gives stockholders who had served notice of withdrawal upon the association no preference or advantage over stockholders who had not given such notice; and second, that it treats those who are called "paid-up stockholders" the same as all others.

It is not denied, but fully appears from the record, that at the time notice of withdrawal was given by the stockholders now claiming the benefit of such notice the association was insolvent. The decree of the circuit court very properly gave such stockholders no advantage over the common stockholders. Notice of withdrawal from an insolvent society does not entitle members to priority of payment over their fellow-stockholders. Endlich on Building Associations, (2d ed.) sec. 108; *Chapman v. Young*, 65 Ill. App. 131, and cases cited.

The second point is a novel one. It seems that the association issued to certain persons what is called "paid-up stock." The form of the certificate is as follows:

"This is to certify that.....of.....is the owner of....shares of the.....series, dated....., of the prepaid capital stock of the Safety Homestead and Loan Association of East St. Louis, Ill., having therefor paid the sum of \$50 per share in advance, transferable only on the books of the association in person or by attorney upon surrender of this certificate, and is entitled to the dividends and is subject to the conditions printed on the back of this certificate and the constitution and by-laws of the association."

The certificate bore the following endorsement: "The stock represented by this certificate is entitled to semi-annual dividend of three per cent on amount paid therefor, which will be deducted from profits earned on stock, balance being credited on stock represented by this certificate. When amount to credit of stock equals \$100 per share, stock is matured, and holder may withdraw same by surrender of this certificate, properly endorsed, and receive \$100 per share therefor. Holder may surrender stock by giving thirty days' notice any time after one year, and receive full amount paid and portion of profits equal to earned and unpaid dividends thereon. Board of directors reserve right to call in, cancel and pay off certificates any time by giving person to whom issued thirty days' notice by mail, at post last known, and by paying him withdrawal value. After expiration of such notice stock represented by this certificate will not be entitled to further dividends, whether presented for redemption or not."

Each of these certificates was issued upon the payment to the association of \$50. The holders now say that the association had no authority, under the law, to issue them. In other words, they contend that a building and loan association, under the statute of this State, cannot lawfully issue paid-up stock; and from that premise they conclude that they themselves may repudiate the validity of the stock, and to the extent of the money paid therefor they should be treated as preferred creditors of the association. If it be true that the association

had no authority of law to issue the stock it is equally true that the holders of that stock had no right or authority of law to accept it, and if they were claiming any benefit therefrom, other stockholders might, with propriety, question the legality of the transaction. But the holders of that stock are in the anomalous position of themselves repudiating its validity, and thereby seek to obtain an advantage over those who are legal stockholders of the association. It seems to us unreasonable to say that these stockholders may be allowed to assert the illegality of the action of the building association to which they themselves were parties, and at the same time, by reason of that illegality, place themselves in a better position than they would have been had their stock been valid. They bought paid-up stock and paid for it. No one is questioning their right to the benefit of that stock, and clearly they cannot be heard to do so.

In case the whole of this paid-up stock shall not be considered as a preferred indebtedness, plaintiffs in error ask the court to hold that the holders thereof be charged with monthly dues on the amount of their stock from its date, so that they may be placed upon an equal footing with other stockholders as to that part, and as to any excess they be declared creditors of the association and paid in full. In other words, their contention is, that if the whole of their stock cannot be paid in full as a preferred indebtedness, part of it may be. Certainly no good reason appears why the holders of paid-up stock should be entitled to any more advantage as to this excess than they would be as to the whole of the stock.

The judgment of the Appellate Court affirming the decree of the circuit court will be affirmed.

*Judgment affirmed.*

Mr. JUSTICE BOGGS, having passed upon this case in the Appellate Court for the Third District, took no part in the decision of the case in this court.

## THE CHICAGO CITY RAILWAY COMPANY

v.

WILLIAM TAYLOR.

*Opinion filed November 1, 1897—Rehearing denied December 21, 1897.*

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1. **APPEALS AND ERRORS**—*when not error for court to refuse instruction directing a verdict.* An instruction directing a verdict may be refused where other instructions have been given for the same party which submit the case to the jury for their consideration.

2. **SAME**—*Appellate Court's affirmance is final upon facts.* In suits at law the judgment of the Appellate Court affirming that of the trial court conclusively settles all controverted questions of fact.

3. **TRIAL**—*court must refuse peremptory instruction when evidence tends to prove the plaintiff's case.* In actions for negligence an instruction directing a verdict for the defendant is properly refused when there is evidence tending to show due care on the part of the plaintiff and negligence by the defendant.

4. **SPECIAL INTERROGATORIES**—*when special interrogatories are properly refused.* Where one of the controlling questions in a case is whether the plaintiff was exercising due care for his safety, which question is fairly submitted to the jury by a special interrogatory, other interrogatories as to whether particular acts of the plaintiff show the exercise of due care may be refused.

5. **PRACTICE**—*Supreme Court may refuse to consider questions raised in reply brief.* The Supreme Court may refuse to consider questions raised by the appellant for the first time in his reply brief.

6. **DAMAGES**—*extent to which "mental suffering" is an element of damage.* Mental suffering, attending or arising from the injury received, is regarded as part of the injury, for which compensation may be allowed by the jury; but injured feelings which might arise in the mind, not part of the pain naturally attending the injury, cannot be regarded as an element of damage.

7. **PLEADING**—*general damages need not be specially alleged.* Such mental suffering as is properly an element of damage is of the character termed "general damages," being those which necessarily flow from a personal injury, and may be shown under the general allegations of the declaration.

*Chicago City Railway Co. v. Taylor*, 68 Ill. App. 613, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

This was an action in the circuit court of Cook county brought by William Taylor, against the Chicago City Railway Company, to recover for a personal injury. At the time of the accident, September 1, 1892, appellant was operating a cable street car line on State street, in the south division of the city of Chicago, which line crossed the intersection of State street with Adams street in that city. The West Chicago Street Railroad Company at that time operated a street horse car line on Adams street, which line crossed and intersected the tracks of appellant on State street. Appellee was a driver on one of the cars of the West Chicago company, and while driving his car across State street, towards the west, it was struck by one of appellant's north-bound cable cars.

The declaration charges, in substance; that defendant carelessly and negligently drove and managed its cable car; that it failed to give any signal or warning of its approach to the crossing; that it was driven at an undue, dangerous and excessive rate of speed; that it negligently failed to stop or slacken the speed of the grip car, but drove the same at a high, undue, excessive and dangerous rate of speed upon and against the horse car, etc. To the declaration the defendant pleaded the general issue, and on a trial before a jury the plaintiff obtained a verdict and judgment for \$15,000. The appellant appealed to the Appellate Court, where the judgment was affirmed.

W. J. HYNES, and H. H. MARTIN, for appellant.

FREDERICK ST. JOHN, and BENJAMIN F. RICHOLSON,  
(A. W. BROWNE, of counsel,) for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

In appellant's argument filed in this court it is first contended that the evidence utterly failed to establish appellee's case, and it was therefore error to refuse appellant's seventeenth instruction, which was as follows:

"The jury are instructed that the evidence in this case would not justify a verdict for the plaintiff, and your verdict must be for the defendant."

The defendant did not, upon the close of plaintiff's evidence nor at the close of all the evidence, move to have the case taken from the jury, nor did it ask to have the jury peremptorily instructed to return a verdict for it, but, on the other hand, the defendant requested the court to give, and the court did give, sixteen instructions, which assumed that the questions of fact necessary to make out a case in favor of plaintiff were properly before the jury. Where instructions have been given at the request of a party which assume the existence of facts necessary to make out a case in favor of the opposite party, it is not error for the court to refuse an instruction like the one here involved. A similar question arose in *Peirce v. Walters*, 164 Ill. 560, and it was there said (p. 565): "In other words, defendants submitted the case to the jury for their determination upon the facts, thereby conceding that there was a question for their decision. The refusal of the instruction, when asked upon the final submission of the case, was proper, because it sought to take away from the jury all questions of fact, and require them to determine, as a matter of law, that there was no evidence before them tending to support the plaintiff's cause of action. If the defendants desired the court to pass upon the legal question as to whether or not there was any testimony before the jury tending to prove the plaintiff's case, and to bring that question before this court for review as a question of law, they should have asked to have the case withdrawn from the jury before the final submission."

But even if the question attempted to be raised had been properly presented by appellant the ground urged for a reversal of the judgment could not be sustained. If no evidence whatever had been introduced tending to prove that plaintiff was in the exercise of ordinary care,

or if there was no evidence of negligence on the part of the defendant, it might, and doubtless would, have been the duty of the court, on application, to direct the jury to find for the defendant. But such was not the case. We shall not stop here to review the evidence. It is sufficient, however, to say there was evidence tending to prove ordinary care on behalf of plaintiff and evidence tending to prove negligence on the part of the defendant, and such being the case, it was the duty of the court to leave it to the jury to determine the weight of the evidence and return a verdict accordingly. That has been done, and the plaintiff recovered a judgment in the circuit court. Whether that judgment was supported by the evidence was a question which the appellant might properly contest in the Appellate Court, but when appellant was defeated there and the judgment was affirmed in the Appellate Court, all controversy over the facts was ended, the judgment of that court being founded on the facts.

Appellant has filed here a long brief and argument, in which the facts involved in the case have been elaborately discussed; but we shall not follow appellant in the discussion, as that question is not here for our determination.

It is next contended on behalf of appellant that the trial judge erred in refusing to propound to the jury the second, third, fourth, fifth, sixth and seventh special interrogatories asked by defendant. They were as follows:

"*Second*—Could the plaintiff, after entering upon the north-bound track on the occasion in question, have escaped the collision with the grip-car by the exercise of reasonable and ordinary care on his part in the driving of his team and the management of his car?"

The third was like the second, except that the word "avoided" was used instead of the word "escaped," before the words "the collision."



*"Fourth—*Ought the plaintiff, on the occasion in question, in the exercise of reasonable and ordinary care under the facts and circumstances appearing in evidence, to have allowed the grip-train to pass by before entering upon the north-bound track?

*"Fifth—*Ought the plaintiff, on the occasion in question, in the exercise of reasonable and ordinary care under the facts and circumstances appearing in evidence, after entering the north-bound track to have hastened his car?

*"Sixth—*Was the plaintiff guilty of a want of ordinary and reasonable care in entering upon the north-bound track ahead of the cable train, under the facts and circumstances appearing in evidence?

*"Seventh—*Was the plaintiff guilty of a want of reasonable and ordinary care, on the occasion in question, in not driving faster than he did after entering upon the north-bound track, under the facts and circumstances appearing in evidence?"

While the court refused the foregoing interrogatories the following was given:

*"Eighth—*Could the plaintiff, Taylor, by the exercise of reasonable and ordinary care and watchfulness on his part, have avoided the collision in question?"

The Appellate Court held that all of the refused interrogatories were embodied in No. 8, which was given, and we are inclined to the opinion that the court was correct. It is manifest that the real, important and controlling question in the case was whether the plaintiff, in driving the horse car across the track of appellant, exercised ordinary care to avoid the collision which resulted in his injury. If that question was fairly submitted in interrogatory No. 8 there was no necessity for propounding other questions to the jury which might have a near or remote bearing on the question. Had the jury found, in answer to interrogatory No. 8, that Taylor, by the exer-

cise of reasonable and ordinary care, could have avoided the collision, and so returned in the verdict, that would have been an end of the case. So, also, a finding that Taylor, by the exercise of reasonable and ordinary care, could not have avoided the collision, would seem to be conclusive on the question of plaintiff's negligence. So far, then, as the question of negligence of the plaintiff or the question of the exercise of ordinary care on his part may be involved, the interrogatory propounded covered all that was involved, and while the other interrogatories may have some remote bearing on the question and might have elicited evidentiary facts, we do not think the court erred in refusing them.

A similar question arose in *Chicago and Northwestern Railway Co. v. Dunleavy*, 129 Ill. 132. There, as here, the question involved was whether the person injured had exercised ordinary care for his safety. Counsel for the railway company requested the court to submit to the jury the following interrogatory: "What precaution did the deceased take to inform himself of the approach of the train which caused the injury?" The court refused the interrogatory as asked, but modified it to read as follows: "Was the deceased exercising reasonable care for his own safety at the time he was killed?" The ruling of the court on the modification was sustained. It was there said (p. 146): "The ultimate fact which it was incumbent upon the plaintiff to prove, and which the defendant sought to disprove, was, that the deceased, at the time he was killed, was in the exercise of due care. That was one of the issues made by the pleadings, and it was one of the ultimate facts upon which the plaintiff's right to recover necessarily depended. What the deceased did to inform himself of the approach of the train was material only as tending to show reasonable care on his part or the want of it. His acts in that behalf, then, whatever they may have been, were facts which were merely evidential in their nature, and while they doubtless would have had a

tendency to prove reasonable care or the contrary, there were none of them, so far as the evidence shows, which would have been conclusive of that question. The question, then, as submitted by the defendant's counsel, sought to obtain a finding as to mere probative facts, and the court therefore properly refused to require the jury to answer it."

What was said in the case cited applies here. The practice of submitting a large number of interrogatories in a case of this character is more likely to confuse a jury than lead to a correct result, and it ought not to be encouraged.

It is next claimed that the court erred in its ruling on the evidence, and under this head it is claimed the court erred in refusing to allow F. L. Fuller to answer the following question: "Mr. Fuller, has there been a general custom with respect to priority of horse cars and cable cars,—cable trains,—at points where they intersect, during your connection with the West Division Street Railway Company?" The witness had only been connected with the railway company since the accident, and had no knowledge in regard to the existence or non-existence of a custom at the time the accident occurred, and for this reason, no doubt, the court held, and properly so, that his evidence was incompetent. The witness was also asked to state the custom of other roads in St. Paul, but the court held the evidence inadmissible. If defendant relied upon a general custom, proof of such custom should be confined to the time and place of the accident, and evidence of that character was admitted on behalf of the respective parties. So far, therefore, as the ruling of the court on this branch of the evidence is concerned no error was committed.

The court allowed one of appellee's witnesses to testify that the cable cars were run at the usual rate of speed on the morning of the accident, and that the witness did not see anything unusual. Whether the evidence of this

witness was competent or incompetent was of but little importance, as the evidence was not of a character to injure the appellant.

Objection is also made that a witness was allowed to state that he had seen cars stopped in twenty or thirty feet, which were running at the usual rate of speed. We perceive no substantial objection to the evidence. Indeed, after a careful consideration of the record we find no substantial error in the ruling of the court on the admission or exclusion of evidence.

The last ground relied upon to reverse the judgment is, that the court erred in giving plaintiff's fifth instruction. Upon an examination of the record it will be found that this question was not raised and relied upon in the argument in the Appellate Court, nor was the question relied upon in appellant's original brief filed in this court, but, on the other hand, the question was raised and insisted upon in argument for the first time in the reply brief filed in this court. As a justification for not raising the question at an earlier date appellant's counsel, in their reply brief, say: "The rule that this court will not ordinarily consider points which are first made in a reply brief is not an inflexible rule, and will not be applied when those points are (as in the case at bar) preserved in the record and assigned for error, or where good cause exists for not so applying it."

When a question is not raised in the argument by the appellant until he files his reply brief, the court might properly refuse to consider the question, as having been presented too late. But in this case appellee, as it seems, appeared and filed suggestions in reply to the question raised in the reply brief, and as both parties have presented their views in regard to the instruction we have concluded to consider it.

The instruction complained of in substance directed the jury that in determining the amount of damages which the plaintiff is entitled to recover, the jury have the right

to, and should, take into consideration the permanent disability, if any, caused by said injuries, and any future bodily and mental pain or suffering, if any, that the jury may believe, from the evidence, the plaintiff will sustain by reason of injuries received. The objection to the instruction is, that it authorizes a recovery for future mental pain or suffering.

The question as to a recovery for physical and mental pain is not entirely new in this court. In *Indianapolis and St. Louis Railroad Co. v. Stables*, 62 Ill. 313, an instruction was challenged which informed the jury that they might take into consideration pain and anguish of mind consequent on such injury, but the instruction was sustained. It is there said (p. 320): "It is the mind that either feels or takes cognizance of physical pain, and hence there is mental anguish or suffering inseparable from bodily injury. \* \* \* The mental anguish which would not be proper to be considered is, where it is not connected with the bodily injury, but was caused by some mental conception not arising from the physical injury." In *Hannibal and St. Joseph Railroad Co. v. Martin*, 111 Ill. 219, the jury were instructed that "in determining the amount of damages the plaintiff is entitled to recover in this case, if any, the jury have a right to, and they should, take into consideration all the facts and circumstances in evidence before them, the nature and extent of the plaintiff's physical injuries, if any, testified about by the witnesses in this case, her suffering in body and mind, if any, resulting from such injuries, and also such prospective suffering and loss of health, if any, as the jury may believe, from all the evidence, \* \* \* she has sustained or will sustain by reason of such injuries." The court held the instruction correct, and said (p. 232): "Where suffering in body and mind is the result of injuries caused by negligence, it is proper to take them into consideration in estimating the amount of damages." See, also, *City of Chicago v. McLean*, 133 Ill. 148, where the *Stables case*, *supra*,

was cited and approved; also *Central Railway Co. v. Serfass*, 153 Ill. 379.

In a case of this character we are inclined to the opinion that the rule established by the cases cited is, that any physical and mental suffering attending or arising from the injury received may be regarded as a part of the injury, and, as such, a proper subject of compensation; but injured feelings which might arise in the mind, resulting from the injury, not being a part of the pain naturally attending the injury, cannot be regarded as an element of damage.

Counsel for appellant have cited *Bovee v. Town of Danville*, 53 Vt. 183. In that case an action was brought against the town to recover for an injury resulting in a miscarriage of the plaintiff. In the discussion of the question of damages the court said: "The plaintiff was entitled to recover all damages that were naturally and legitimately consequent upon the negligence of the town. If the violence done her person resulted in the miscarriage, that was a legitimate result of such negligence. Any physical or mental suffering attending the miscarriage is a part of it and a proper subject of compensation. \* \* \* Any injured feelings following the miscarriage, and not a part of the pain naturally attending it, are too remote." From the foregoing quotation it seems plain that the rule laid down in the case cited is in harmony with the doctrine declared by this court in the cases *supra*.

Other cases have been cited by appellant, but it will not be necessary to refer to them here, as the question has been substantially settled by the decisions of this court against appellant's view in the cases cited *supra*.

It is also claimed that the instruction was erroneous upon the ground that no allegation or claim as to mental suffering is made in the declaration. This question was settled in *City of Chicago v. McLean*, 133 Ill. 148, where it was held that those damages which necessarily result from the injury are termed "general," and may be shown under

the general allegations of the declaration; that only those damages which are not the necessary result of the injury, and which are termed "special," are required to be stated specially in the declaration.

We do not regard the instruction complained of erroneous or calculated to mislead the jury.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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HENRY MUELLER

v.

THE MOREDOCK AND IVY LANDING DRAINAGE DISTRICT.

*Opinion filed November 8, 1897—Rehearing denied December 9, 1897.*

The principal questions involved in this case have been decided in the case of *Winkelman v. Moredock and Ivy Landing Drainage District*, (ante, p. 37,) and the decision in that case must control here.

APPEAL from the County Court of Monroe county; the Hon. WILLIAM P. EARLY, Judge, presiding.

JOSEPH W. RICKERT, for appellant.

TRAVOUS & WARNOCK, for appellee.

Per CURIAM: While the record in this case is not in all respects the same as the record in *Winkelman v. Moredock and Ivy Landing Drainage District*, (ante, p. 37,) still the principal questions in both cases are the same, involving the validity of the special assessment mentioned in the record, and that assessment having been declared invalid in that case the same result must follow in the case at bar. Following that decision the judgment in this case will be reversed and the cause remanded.

*Reversed and remanded.*

## ANSLEY HITZ

v.

OLAF H. AHLGREN.

*Opinion filed November 1, 1897—Rehearing denied December 14, 1897.*

1. EVIDENCE—*rule as to presumption of death from seven years' absence stated.* The absence of a person for seven years from his usual place of abode or resort, of whom no account can be given and from whom no intelligence has been received during that time, raises the presumption that he is dead.

2. SAME—to raise presumption of death, absence must be from usual place of abode. The mere absence of a person from a place where his relatives reside, not his own residence, and the failure of his relatives to receive letters from him for a period of seven years, are not of themselves sufficient to raise presumption of death.

3. SAME—*what must be shown to raise presumption of death.* In order to raise the presumption of death of a person after seven years' absence, there must be evidence of diligent inquiry at his last place of residence, and among his relatives, and any other persons who would probably have heard from him were he living.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

Appellant filed his bill in the Superior Court of Cook county to establish title to an undivided two-thirds of lot 123, in Hull's subdivision to Chicago, alleging the destruction of the original records by the fire of 1871. The bill proceeded upon the theory that one John Phalen was the owner of this lot in 1870, and that he had been absent and not heard from for seven years, and therefore a presumption of his death had arisen. On this presumption appellant had obtained quit-claim deeds from four of the six alleged brothers and sisters of Phalen, and claimed title to an undivided two-thirds of the lot in question. The answer of appellee denied the death of John Phalen or that the parties executing the quit-claim deeds had any interest whatever in the property, and set up that in 1887 one Leonard C. Stebbins filed a bill under the Burnt

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Records act, in the Superior Court of Cook county, claiming color of title acquired in good faith to this lot, together with payment of taxes for seven successive years, and thereafter took possession of the property; that a decree was entered on said bill establishing and confirming title in Stebbins, who afterwards, by deed, conveyed to appellee.

The only witness called upon to testify in this case was one Bridget Cullen, for complainant below, who represented herself to be a sister of John Phalen. Some question arose as to the names of the parties conveying to appellant, all of whom executed their deeds under the names of *Phelan*. It developed, however, from the testimony of this one witness, that John Phalen was not a resident of Chicago. He made his home in St. Louis, New Orleans and Indian Territory, and only occasionally visited Chicago, the last time being about the time of the Chicago fire. The witness testified she heard from him once or twice within a year after that time, and then communication ceased. It seems, however, that she is unable to read or write or in any way to carry on a correspondence. The other heirs were scattered in different parts of the country. After the Chicago fire the lot had apparently been abandoned, and no attention paid to it by any one except appellee and his grantors, until the procurement of these quit-claim deeds by appellant, in 1893.

On this evidence the Superior Court of Cook county, at the close of complainant's testimony, allowed the motion of defendant below and entered a decree dismissing the bill. A motion to set aside this decree and grant a rehearing was subsequently granted, and appellant was permitted to show an unavailing search for John Phalen in New Orleans. The Superior Court still retained the same view of the case after the rehearing and entered a decree dismissing the bill, from which an appeal is prosecuted to this court seeking to reverse that decree.

OLIVER & MECARTNEY, for appellant:

The absence of a party for seven years, without any intelligence being received of him within that time, raises the presumption that he is dead, and the jury, on proof of such absence, have a right to presume his death. *Whiting v. Nicoll*, 46 Ill. 230.

At the expiration of seven years the presumption of death arises by law, so that the absentee is to be treated and accounted as dead, just as the common law regarded him as living until death was proved. In neither case is life or death actually proved, but he is accounted as living until, by reason of his absence, he is presumed to be dead; and, as a matter of right and of equity, the relations of parties affected by his life or death are to be determined by these technical presumptions. *Reedy v. Millizen*, 155 Ill. 636.

The reputation or general family belief of death is one of the most ancient and well-recognized doctrines of the rule of evidence. Buller's *Nisi Prius* Cases, 294, 295; *Van-Sickle v. Gibson*, 40 Mich. 170; 1 Taylor on Evidence, sec. 642; Wharton on Crim. Evidence, (9th ed.) sec. 245; *Mason v. Fuller*, 45 Vt. 29; 1 Wharton on Evidence, sec. 223; *Betty v. Nail*, 6 Irish C. L. 17; 1 Greenleaf on Evidence, sec. 104, note a.

G. FRANK WHITE, for appellee:

A mere failure to hear from a person for seven years, who resided, when last heard from, in a distant city, does not raise the presumption of death. Lawson on Evidence, 214; *McRee v. Copelin*, 2 Cen. L. J. 813.

An absence of seven years or more from the established residence of a party must be proved before the presumption of his death can be raised. *Stinchfield v. Emerson*, 52 Me. 465.

When a person is once shown to be living, the burden of proof lies upon the party who asserts the death. 1 Greenleaf on Evidence, (15th ed.) sec. 41.

The presumption of life of a person once shown to be living continues until the contrary is shown. *Duke of Cumberland v. Graves*, 9 Barb. 595; *Letts v. Brooks*, H. & D. Supp. 36.

Mr. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

The principal question presented by this record is whether or not there was such a legal presumption of the death of John Phalen, the former owner of this lot, as would entitle his heirs to make conveyances of the property. The rule in this State is, that the absence of a person for seven years from his usual place of abode or resort, and of whom no account can be given and from whom no intelligence has been received within that time, raises the presumption that he is dead. (*Whiting v. Nicoll*, 46 Ill. 230.) In this case it does not appear that the usual place of residence of John Phalen was in Chicago. He was a horse-shoer by trade, and had resided in the Indian Territory a number of years; had engaged in working at his trade in the army through the war; had lived in New Orleans, and, as probably shown by the testimony, also in St. Louis. The mere facts that he was absent from Chicago, and that one relative living in Chicago, who could neither read, write nor carry on a correspondence, had received no letters from him, were not sufficient, under the law, to raise the presumption of his death. It does not appear from this evidence that other brothers and sisters were not in correspondence with him, nor does it appear that he was absent from the place where he had lived in St. Louis or in the Indian Territory. It is only attempted to be shown by the deposition introduced after the first decree of the court was rendered, that he could not be found in New Orleans.

In order to enforce the presumption of death of a person after an absence of seven years, there must be evidence of diligent inquiry at the person's last place of

residence, and among his relatives, and any others who probably would have heard from him, if living. (*Hancock v. American Life Ins. Co.* 62 Mo. 26; 2 Greenleaf on Evidence, (15th ed.) sec. 278f; *Wentworth v. Wentworth*, 71 Me. 72; *Bailey v. Bailey*, 36 Mich. 182; *Whiting v. Nicoll*, *supra*.) Long absence alone, no matter how long continued, is not sufficient to raise the presumption of death. There must be shown an absence of seven years or more from the established residence of the party, before the presumption of death can be raised. (*Stinchfield v. Emerson*, 52 Me. 465.) There is in most States an almost entire uniformity of authority on this question. We hold, therefore, that mere absence of a person from a place where his relatives reside, but which is not his own residence, and mere failure on the part of his relatives to receive letters from him for a period of seven years, are not of themselves sufficient to raise a presumption of death. The absence must be from his usual place of abode or resort.

In this case the trial court heard the evidence in open court, and had a better opportunity to judge of the credibility of the witnesses. The finding of the trial court in a case of this kind is entitled to great weight, and to authorize a reversal it must appear there was error of fact in its finding, and that such error was clear and palpable. *Coari v. Olsen*, 91 Ill. 273; *Baker v. Rockabrand*, 118 id. 365; *Johnson v. Johnson*, 125 id. 510; *Voss v. Venn*, 132 id. 14; *Kusch v. Kusch*, 143 id. 353; *Allen v. Hickey*, 158 id. 362; *Ellis v. Ward*, 137 id. 509.

There is no cause shown by this record why the decree of the Superior Court of Cook county should be reversed, and it is affirmed.

*Decree affirmed.*

ARVILLA L. MADISON *et al.*

v.

W. E. LARMON *et al.*

|     |     |
|-----|-----|
| 170 | 65  |
| 180 | 444 |
| 170 | 65  |
| 188 | 36  |
| 170 | 65  |
| 196 | 50  |

*Opinion filed November 1, 1897—Rehearing denied December 10, 1897.*

1. **REAL PROPERTY**—*tenant in common, as to his share, owns entire and separate estate.* A tenant in common is, as to his individual share, the owner of an entire and separate estate.

2. **PERPETUITIES**—*rule against perpetuities stated.* No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.

3. **SAME**—*remoteness of provision of will determined from time of testator's death.* The time of the testator's death is the true period from which to determine the remoteness of provisions of his will.

4. **SAME**—*life estate vesting within time limited by rule against perpetuities may extend beyond it.* A life estate is good if it vests within the time limited by the rule against perpetuities, although it may continue beyond that time.

5. **SAME**—*estate may become vested though right of enjoyment is postponed.* A contingent remainder is good if it vests within the time limited by the rule against perpetuities, although the right of enjoyment be postponed beyond that time, as the rule against perpetuities does not apply to vested remainders.

6. **WILLS**—*use of word "parent" confines word "issue" to children.* The meaning of the word "issue," when used with reference to the parent, as where the "issue" is to take the share of a deceased parent, is confined to the children of the taker.

7. **SAME**—*when provision of will creates a contingent remainder.* A devise of property arbitrarily divided into twenty-nine shares, to seventeen persons, each taking a life estate in his respective share, with remainder in fee, upon the death of *all* the life tenants, to the testator's grandchildren, share and share alike, creates a contingent remainder, which cannot vest until the death of the last surviving life tenant.

8. **REMAINDERS**—*contingent remainder perishes unless it vests before preceding estate terminates.* Unless a contingent remainder becomes vested before the determination of the preceding estate it must perish, and can never come into possession.

9. **SAME**—*when life estate terminates before contingent remainder limited thereon vests, property passes to heirs.* Where a life estate terminates before a contingent remainder limited thereon becomes vested, the property passes in reversion to the heirs-at-law of the testator at the time of the determination of the life estate.

10. *SAME*—*estate limited on contingency may fail as to one part and take effect as to another.* Where a preceding estate, upon which a contingent interest is limited, is in several persons in common or in severalty, the contingent estate may fail as to one part and take effect as to another, as one tenant may die before the contingency happens and another survive it.

11. *ESTOPPEL*—*one taking under a will cannot contest it as heir.* One who takes under a will cannot afterward contest it as an heir-at-law of the devised property.

WRIT OF ERROR to the Circuit Court of Cook county;  
the Hon. M. F. TULEY, Judge, presiding.

J. ERB, and D. J. HAYNES, (WILKINS & BRADBURN, of counsel,) for plaintiffs in error:

A freehold must be continuous. It implies not only the conveying of lands, but the fixing of the limits or extent of the interest conveyed. 1 Preston on Estates, 218, 252, 253; 1 Law Mag. 561.

A freehold cannot be put in abeyance by the act of the party. 1 Washburn on Real Prop. (3d ed.) 62; 1 Preston on Estates, 216; 1 Law Mag. 557.

A life estate is a personal interest, and, like dower, not capable of inheritance. It ceases with the death of the life holder. *Dodge v. Pond*, 23 N. Y. 89; *Beckman v. Bousson*, id. 306; *Leonard v. Burr*, 18 id. 107; *Bascom v. Albertson*, 34 id. 584; *Cruickshank v. Home of Friendless*, 113 id. 351.

The question in expounding a will is, not what the testator meant, but what is the meaning of the words. *Bates v. Woodruff*, 123 Ill. 205.

A perpetuity is a limitation taking the subject thereof out of commerce for a longer period of time than a life or lives in being and twenty-one years beyond. *Hale v. Hale*, 125 Ill. 399.

The most frequent instances of the transgression of the rule against perpetuities occur in devises or bequests to classes, composing either individuals who may not come into existence at all during a life in being and twenty-one years afterwards, or persons who may not be

*in esse* at the death of the testator and the vesting of whose shares is postponed beyond majority. 1 Jarman on Wills, 529.

The suspension of the power of alienation must necessarily terminate, under any and all circumstances, within the period prescribed by law, or the disposition will be bad. *Knox v. Jones*, 47 N. Y. 397; *Schettlar v. Smith*, 41 id. 328; *Ford v. Ford*, 70 Wis. 61; *Coggin's Appeal*, 124 Pa. St. 10.

If a remainder is void as to any of the persons entitled to take, it is void *in toto*. *Coggin's Appeal*, 124 Pa. St. 31; *Barnum v. Barnum*, 26 Md. 173; *Lewis on Perpetuities*, 494.

Where a will is pronounced void by the court, as coming within the rule against perpetuities, the testator is held to have died intestate as to the property devised by the will. *Tongue v. Nutwell*, 13 Md. 416; *Barnum v. Barnum*, 26 id. 174; *Deford v. Deford*, 36 id. 179; *Fosdick v. Fosdick*, 6 Allen, 148; *Mills v. Newberry*, 112 Ill. 123.

KERR & BARR, for defendants in error:

A court of chancery has no jurisdiction of a bill to construe a will where only legal titles are involved. *Strubher v. Belsey*, 79 Ill. 307.

When a subsequent condition or limitation over is void by reason of its being impossible, repugnant or contrary to law, the estate becomes vested in the first taker discharged of the condition or limitation over, according to the terms in which it was granted or devised. If for life, it then takes effect as a life estate; if in fee, then as a fee simple absolute. *Howe v. Hodge*, 152 Ill. 252.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The circuit judge, before whom this cause was heard, sustained a demurrer to the bill and dismissed the bill for want of equity. The reasons given for the decree thus entered commend themselves to our judgment as being a proper disposition of the questions involved. We, there-

fore, adopt such reasons as the opinion of this court. They are as follows:

"This is an action brought in this court on the equity side thereof, praying the partition and sale of certain premises known as No. 185 South Clark street, in the city of Chicago, county and State aforesaid, said premises having heretofore been devised by will of the late Henry Larmon, deceased, of Warren county, Kentucky, to certain of his children and grandchildren named in the will. The fourth clause of his will contains the entire terms, conditions and limitations of the various devises of this property, and is as follows, viz.:

"*Fourth*—I will and devise said house and lot, No. 185 South Clark street, Chicago, Illinois, as follows: I divide it into twenty-nine shares, which I bequeath as follows: To my son, Connelly, two shares, for and during his life; to his children, Genie, John, Euran, Clement and Lucian, each one share, for and during their respective lives; to my daughter, Sardinia, six shares, for and during her life; to her children Monroe, Vernon, Charles and Sydney each one share, for and during their respective lives; to her children Lilly, Jetta, Elizabeth and Mary each two shares, for and during their respective lives; to said Katie Madison and Arvilla Madison each two shares, for and during their respective lives. If said Connelly shall die leaving any of his said children alive, his two shares shall be divided equally among such of said children as may be living, to be held by them, respectively, for and during their lives. If said Sardinia shall die leaving any of her said children alive, her six shares shall be divided equally among such of said children as may be living, to be held by them, respectively, for and during their lives. If any of said children of Connelly, Sardinia or Mary shall die leaving no issue alive at the date of such death, the share or shares of such child so dying shall be equally divided among the brothers and sisters, to be held by them, respectively, for and during their lives; but if such child



dies leaving issue alive, such issue shall have the parent's share in possession, to be held till my son, Connelly, and his aforesaid children, my daughter and her aforesaid children, said Kate and Arvilla, shall all be dead; and when they shall all be dead, I will and devise said house and lot to all of my grandchildren then living, share and share alike, and if any grandchild shall be then dead leaving issue alive, such issue shall take the share the parent would have taken if living. But it is my will that the share of the rent going to each of the aforesaid children of my son, Connelly, shall go to him for his own use till such child arrives at the age of twenty-one years, and that likewise the share of the rent going to each of the aforesaid children of my daughter, Sardinia, shall go to her for her own use till such child arrive at the age of twenty-one years; but this bequest of rents to Connelly and Sardinia is personal, and upon their respective deaths the rents shall go to their respective children named, though infants. In order to carry into effect this part of my will, my executor is directed to rent and keep rented said house and lot and to distribute the net proceeds according to this will. In his management of said property he shall be governed by the majority of votes of those entitled to rents at the time. The guardian of every infant entitled to rent shall have the right to vote for such infant. Such renting and management shall continue till my son and daughter, their aforesaid children, and said Katie and Arvilla, are all dead, and after the death of my executor the proper court will appoint an administrator with this will annexed for the purpose.'

"In construing this particular will it will be necessary, in the first place, to discuss the life estates created, before considering the remainder in fee.

"The seventeen named devisees for life, (being the testator's two children and fifteen grandchildren,) each being given distinct shares in this Clark street house and lot, became, upon the testator's death, tenants in common for

life. A tenant in common is, as to his own individual share, in the position of an owner of an entire and separate estate. To illustrate what life estates are provided for and are possible under this will, let us take Connelly's two shares,—his separate estate of two twenty-ninths of the property. The first freehold or particular estate is for the life of Connelly. Second, if Connelly dies, then his (Connelly's) five named sons, (grandchildren of testator,) Genie, John, Euran, Clement and Lucian, take the two equal shares in equal parts for life. Third, assuming that when the will speaks of the 'brothers and sisters' taking the interests of a deceased brother or sister (dying without 'issue alive') that only the grandchildren, brothers and sisters named are intended, then upon Genie dying without issue alive, the other four named brothers would take his interest in equal shares for their lives, respectively. Fourth, if John should then die without issue alive, the other three named brothers would take John's shares or interests for their lives, respectively. Fifth, if Euran should then die without issue, the other two named brothers would take his interest for their lives, respectively. Sixth, if Clement should then die without issue alive, Lucian, the last survivor, would take Clement's interest for his life. Seventh, if Clement should then die leaving issue alive, such issue would take his interest for the life of the unspent lives of the seventeen life devisees named in the will.

"Here are seven life estates in the two shares, or the two twenty-ninths given to Connelly, which are possible before the remainder in fee might vest. Is any known rule of law violated thereby? If any, it is the rule against perpetuities, which is defined to be, that 'no interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest.' (Gray on Perpetuities, sec. 201.) In *Howe v. Hodge*, 152 Ill. 252, our Supreme Court adopt this precise definition of the

rule as laid down by Gray, and adds that 'the true object of the rule is to prevent the creation of interests upon remote contingencies.' The question to be asked of any estate on condition precedent is, 'When must the contingency happen?' The time of the testator's death is the true period at which to judge of the remoteness of the provisions in his will. (*Vanderplank v. King*, 3 Hare, 1; *Lewis on Perpetuities*, 53-57, and cases cited.)

"Tested by these rules, and it will be seen that the contingency, to-wit, the death of the prior life tenant as to all the six life remainders following Connelly's death, must in every case happen within a life in being at the death of the testator, except the last,—i. e., the one to the children of the last surviving brother,—and as to that, it would take effect on his death, to-wit, within twenty-one years after a life in being at testator's death, so that all the successive life estates in remainder would happen within lives in being and twenty-one years thereafter, and would not violate the rule against perpetuities, which Gray says should be properly termed the rule against remoteness. The number of lives in being that are selected makes no difference, as any number of lives *in esse* are allowed. (See Gray, sec. 189.) You cannot give successive remainders for life unless the contingency must occur within lives in being. The estate must vest within the required limits of lives in being and twenty-one years thereafter, and there can be a gift for life to unborn persons in succession, provided their estate must vest within the required limits. (Gray, sec. 206; *Brudenal v. Elives*, 1 East, 442; *Hodson v. Ball*, 14 Sim. 558.)

"The life estates given to the seventeen named devisees (children and grandchildren) are good, and took effect immediately upon testator's death. The remainder over for life to 'the brothers and sisters' of a grandchild who should die leaving no issue alive,—is that good, and who are to take such remainder? That such a gift or remainder over for life is good, see *Tricky v. Tricky*, 3 M. & K. 550.

“What construction should be placed upon the provision that ‘if any of said children of Connelly, Sardinia or Mary shall die leaving no issue alive at the date of such death, then the shares of the child so dying shall be equally divided among the brothers and sisters, to be held by them, respectively, for and during their lives?’ Does this mean the brothers and sisters of the deceased who are theretofore named in the will, and who were *in esse* at testator’s death, or all the brothers and sisters, whether born before or after the testator’s death? I am of the opinion that it means the latter, and that all the brothers and sisters living at the death of such grandchild would share equally, for the reason that the testator, in other parts of the will, appears careful to identify objects of his bounty by the careful use of the words ‘said,’ ‘afore-said,’ ‘named’ and ‘aforenamed.’ It also appears by the clause creating the remainder in fee, that he contemplated the existence of grandchildren not named in his will; and I assume it to be a fact that Kate Larmon, (now Kate Stark,) daughter of Connelly Larmon, was born prior to the date of testator’s death, and as the will speaks from his death, that he used the term ‘the brothers and sisters,’ knowing that all the children of Connelly named in the will were boys, intending to include her as capable of sharing equally with her brothers upon the death of any one of the brothers without issue him surviving.

“This construction is also based on the assumption that the words ‘leaving no issue alive at the date of such death,’ must be construed to mean leaving no children alive, etc. It will be observed that when indicating to whom the remainder in fee shall go, he declares that if any grandchild be then dead, ‘leaving issue alive, such issue shall take the share such parent would have taken if living.’ Where the word ‘issue’ is used with reference to the parent of such issue, as where the issue is to take the shares of the deceased parent, it must mean his children,—that is, the word ‘parent’ confines the word ‘issue’

to the children of the taker. (*Fairchild v. Buchell*, 32 Beav. 158; *Sibley v. Perry*, 7 Ves. Jr. 532.)

"It being clear that as to the remainder in fee he uses the word 'issue' as meaning children, it will be inferred that he used it in the same sense in other parts of the will, as it is a rule that the court will not construe the same words used in different parts of the will as having different meanings, if it is possible to avoid doing so. The intention to use the words in different senses must be clear and beyond question.

"It is contended by complainant that if the term 'the brothers and sisters' includes the brothers and sisters born after testator's death, then, as an after-born brother would have a share for life in the shares left by one of the grandchildren named in the will, as supposing one of Sardinia's named children should die without issue, leaving as his brother one who was born after the testator's death, that after-born brother would share equally with the other living brothers and sisters in the estate of the deceased brother, and such after-born brother, it is contended, might live for twenty-five years after all the seventeen named life devisees had died, and therefore the remainder in fee, as to the portion held by such after-born brother, would not vest in remainder during life or lives in being and twenty-one years thereafter, but would be postponed until the death of such after-born brother, which would be beyond the limited period and void as a perpetuity.

"In the case supposed, the life estate of the after-born brother would certainly vest within the rule against perpetuities, as he takes immediately upon the death of his brother, a named devisee living at the testator's death. That such life estate may continue beyond the time limited by the rule against perpetuities,—*i. e.*, beyond twenty-one years after his brother's death,—does not invalidate the life estate. If it vests if it once commences, it will continue until the end of the life of the taker. 'An in-

terest is not obnoxious to the rule against perpetuities if it begins within lives in being and twenty-one years, although it may end beyond them. \* \* \* And an estate for life is good if it begins within the required limits.' (Gray, sec. 232.) Nor is it true that the remainder in fee would not vest until the termination of the life estate of such after-born brother. The event upon which a contingent remainder is limited may happen, and the contingent become a vested remainder, but not to be enjoyed in possession until some fixed time or until the dropping out of an existing estate for life. There is a difference between 'vesting' and 'the enjoyment of possession,' and it is sufficient if the contingent becomes a vested remainder within the time limited by the rule against perpetuities, although the enjoyment may be postponed beyond such time. 'If an estate is given to A for life and remainder to B's oldest son in fee, the remainder is contingent until the birth of A's first born son, and then vests.' (Gray, sec. 9.) The rule is, that the contingent remainder must become vested on or before the determination of the preceding vested estate. (Gray, sec. 10.) When a remainder becomes a vested remainder, the rule against perpetuities does not apply, as it cannot apply to vested interests.

"If any grandchild dies leaving issue (children) alive, what estate does such issue take? It will be observed that such issue (children) are 'to have the parent's share in possession until my son, Connelly, and his aforesaid children, my daughter and her aforesaid children, said Kate and Arvilla, (the seventeen named devisees,) shall all be dead.' This vests a life estate in such children on the death of the parent, subject to be divested by the death of the last of the seventeen named devisees. Strictly speaking, it is a life estate *per autre vie* for the life of the survivors of the said seventeen named devisees, all of whom were in being at the testator's death. That this is a good life estate, see Gray, secs. 225-227.

"The only remaining question in this case is as to the devise of the remainder in fee. The testator declares: 'And when they,' (*i. e.*, Connelly and his aforesaid children,) 'my daughter and her aforesaid children, said Kate and Arvilla,' (the seventeen named devisees and first life tenants,) 'shall all be dead, I will and devise said house and lot to all my grandchildren then living, share and share alike, and if any grandchild shall be then dead leaving issue alive, such issue shall take the share the parent would have taken if living.' It is contended on behalf of defendants that this provision creates a vested remainder in those who are to take under it, while complainants contend it is a contingent remainder.

"It will be observed that the testator divides the lot into twenty-nine shares, and divides these twenty-nine shares among the seventeen named devisees (children and grandchildren) for life, and, after carving out these life estates on the respective shares devised, he disposes in fee of the lot as a single property, as an entirety. Therefore, the vesting of the remainder in fee, as to any particular share, does not depend solely upon the death of the life tenant of that share, but also depends upon the death of the last of the seventeen life devisees named in the will, 'when they shall all be dead,' says the testator. The remainder in fee is a contingent remainder. The learned author, Fearne, states four kinds of contingent remainders: 'Third, where the condition upon which the remainder is limited is certain in event, but the determination of particular estate may happen before it. \* \* \* Fourth, where the person to whom the remainder is limited is not as yet ascertained or not yet in being.' This remainder would be a contingent remainder under either of these classifications. He also says the present capacity of taking effect in possession, if the possession becomes vacant, distinguishes the vested from the contingent remainder. The learned author says in illustration: 'So in case of a lease for life to A, and after the death of A and

M the remainder to be in fee, this is a contingent remainder for the particular estate. Being for the life of A, and the remainder not to commence until after the death of A and M, if A die before M the particular estate will end before the remainder commences.' (1 Fearne, pp. 5, 7.)

"The provisions of this will as to the remainder in fee are clearly within the illustration. The two grandchildren, Kate and Arvilla, are the children of Mary, a deceased daughter of the testator. These are given four shares, or two twenty-ninths each. If they both should die without issue before any of the other of the seventeen named life devisees, the remainder in fee of these four shares could not take effect in possession, for the reason the remainder-men take nothing until they, the seventeen life tenants, are 'all dead.' The remainder in fee is therefore clearly a contingent remainder. Is, therefore, the remainder in fee void? If not, what is its effect?

"If Kate should survive Arvilla she would have four shares; and suppose she should live twenty-five years longer than any of the other fifteen named devisees of a life estate, then twenty-five twenty-ninths of the property would be without any remainder vested under the will for twenty-five years, and who would take the income thereof for that period of time? Would the remainder as to these twenty-five shares be void, as being obnoxious to the rule against perpetuities, or would the remainder over as to any shares be cut off by the dropping out of the life estate of such share?

"If all the interests held in severalty should determine at one time,—that is, if all the seventeen named devisees should die at one and the same instant of time,—then the remainder as to the several shares would vest at the same time. But it cannot be supposed that the testator contemplated such an almost impossible event. The difficulty as to the remainder arises from the fact that the shares held by the several life tenants are held in severalty, and the remainder is disposed of as one property



and a distinct entity. The remainder is to take effect upon the determination, not of the life estates carved out, but upon the extinguishment of the life of all the seventeen named devisees, children and grandchildren of the testator.

"A remainder over, to vest upon the death of a stranger to the estate, is a valid remainder. 'The contingency may be postponed for any number of lives, provided they are all in being when the contingent interest is created, and the persons whose lives are taken need have no interest in the estate,' is the rule as clearly laid down by Gray, sec. 260. This rule was laid down in the leading case of *Thelluson v. Woodford*, where the testator directed the accumulation of the income during the lives of all his sons, grandsons and grandsons' children who should be alive at his death, and then divided into three lots. The division was sustained by Lord Loughborough, whose decree was affirmed in the House of Lords. (4 Ves. 227; 11 id. 112.) In *Cadwell v. Palmer*, an executory devise to take effect upon the death of twenty-eight living persons, seven only of whom were to take interests under the devise, was sustained. (1 Cl. & F. 372.) At the death of the testator, Henry Larmon, these seventeen named devisees (children and grandchildren) were all alive, so that it is seen that the remainder in fee vests upon the determination of a life in being at the testator's death,—i. e., upon the death of the survivor of the seventeen,—and therefore does not contravene the law against perpetuities. 'All the candles are lighted at once, and therefore it was only the duration of one life.'

"What effect is to be given to this remainder in fee? In order to have a valid remainder there must always be a particular estate to support it. Where the remainder is a contingent remainder, the remainder must vest during the existence of the particular estate or at the instant of its determination. The rule is thus stated in *Fearne*: 'It has already been shown that a legal remainder must

vest either during the existence of the particular estate (*in esse* or in right of entry) or at the very instant of its determination, otherwise it will never take effect, consequently every such determination of the preceding estate as leaves no right of entry must effectually destroy such contingent remainder.' (Sec. 316.) And in section 310: 'Upon the principles here laid down that a contingent remainder must vest by the time the preceding estate determines, it follows that an estate limited on a contingency may fail as to one part and take effect as to another, wherever the preceding estate is in several persons in common or in severalty, for the particular tenant of one part may die before the contingency happens and the particular tenant of another part may survive it.' Unless a contingent remainder becomes vested on or before the determination of the preceding vested estate it can never come into possession—it has perished. It makes no difference whether the preceding estates have ended by reaching the limit originally imposed upon them, or whether they have been cut short by merger, forfeiture or otherwise. (Gray on Perpetuities, sec. 10.)

"To illustrate the application of these rules to the case at bar, we will suppose that Katie Madison is the first of the seventeen devisees to die, and dies without issue. Her brother Arvilla takes her two shares for life. Arvilla then dies without issue, possessed of four shares. Having no brothers or sisters living, the life estates created by the will in the four shares, or four twenty-ninths, have determined with Arvilla's death. The remainder in fee as to the four shares has perished, because it did not vest by the time the preceding life estates determined, and could not vest under the will until all others of the seventeen devisees had deceased. The same thing might happen as to the life estates vested in Connelly and his five sons, and Sardinia and her named children. Connelly dying, all his sons might die without issue surviving; Sardinia and all her children might die without issue surviv-

ing; Katie might also die without issue, leaving Arvilla the only named life tenant in existence. The remainder in fee as to all the shares held by Connelly and his children, Sardinia and her children, would have perished. There can be no interregnum as to a freehold, or between the ending of a life estate and the vesting of the remainder.

"It is, however, certain that the remainder in fee must vest as to some of the shares, but as to what particular shares or number of shares cannot be known until the death of the last survivor of the seventeen named children and grandchildren. The remainder-men will succeed to the ownership in fee of the shares held by such survivor at his death, but which one of the seventeen named life tenants will be such survivor cannot be determined until sixteen of them have died. If it should be Arvilla, the remainder-men in fee would take the four shares held by him. The life estates in the other shares (if Connelly and Sardinia die and their children should have deceased without issue) would all have determined and the remainders have perished. If any first named life tenants, any of the seventeen, should die leaving issue (children) alive, and such issue should still be alive at the death of the last one of the seventeen, such issue would hold for life the shares which they took from their parents. The contingent remainder having become vested by the death of the last of the seventeen named devisees, it would be good to take effect in possession on the death of such last named issue.

"As to the life estates that drop out before the remainder in fee has vested, where is the fee as to the shares owned by such life tenants who have deceased?—as, for example, if Katie and Arvilla should both die without issue before the last of the seventeen? If a contingent remainder becomes impossible of vesting because of the determination of the life estate before the contingency upon which the remainder was limited has happened,—

*i. e.*, if the contingent remainder has perished,—it is the same as if it never existed. Says Gray (sec. 11): ‘A future estate may be indirectly created by giving livery of seizin for one or more life estates without ultimate remainder in fee. The estate remaining in the former owner ready to come into possession on the termination of the life estate or estates is a reversion. The same result is reached when an ultimate remainder in fee is contingent. Until it vests there is a reversion to the feoffer and his heirs.’ And in the note he says: ‘When a conveyance is by way of use or devise, there is unquestionably, during the contingency of a remainder in fee, a reversion in the grantor or devisor, and his heirs.’

“‘If the devise of a future interest is void for remoteness, but the prior devise is for life only, or other limited period, \* \* \* the property, after the termination of the prior interest, goes to the person to whom the property which has been invalidly devised or bequeathed, goes. This person is generally the heir in case of real estate, and the residuary legatee in case of personalty. There is no difference, in this respect, between a devise or bequest void for remoteness, and a devise or bequest void for any other reason.’ (Gray, sec. 248; *Tongue v. Nutwell*, 13 Md. 415; *Deford v. Deford*, 36 id. 168.) ‘Void devises, like lapsed devises, go to the heir.’ (1 Jarman, 646; *VanKleck v. Church*, 6 Paige, 604.)

“Therefore, when any life estate drops out (*i. e.*, where a life estate ceases, there being neither brother nor sister nor issue living to take for life under the will,) before the last of the seventeen life devisees dies, the persons who would be the heirs-at-law of the testator at the time of such dropping out of the life estate would take the interest as to the shares held by such life tenant at his decease. If any of the named grandchildren, who are life tenants under the will, dies leaving issue (children) him surviving, and any of such issue (children) dies before the last of the seventeen named life devisees, then the re-

mainder as to the interest held by such child, will go in reversion to the then heirs-at-law of the testator.

"The only remaining question is as to who are the remainder-men in fee. When they (the seventeen named life tenants) shall all be dead, 'I will and devise said house and lot to my grandchildren then living, share and share alike, and if any grandchild shall be then dead leaving issue alive, such issue shall take the share the parent would have taken if living.' This carries the fee, the property being required to be divided share and share alike.

"In his will the testator names all the grandchildren living at his death, except Kate Larmon, daughter of Connelly, (now Kate Stark,) and gives them life estates, and when they shall all be dead he gives to all his grandchildren,—i. e., at the time the last of the named seventeen devisees (children and grandchildren) shall die,—the remainder in fee. This would include Kate Stark, if living, and all grandchildren born after the testator's death and then living. But what does the testator mean when he says, 'If any grandchild be then dead leaving issue alive, such issue to take the share the parent would have taken if living?' There does not appear upon the face of the will any reason why he should discriminate among his great-grandchildren. I am of the opinion that he did not intend to, and that his intention was to place them upon an equality (*per stirpes*) with the after-born (or not specifically named) grandchildren who might be living when the contingency happened upon which the fee was to vest. He uses the most comprehensive words, 'If *any* grandchild shall be then dead leaving issue alive, *such issue to take.*' He intended the living grandchildren to take share and share alike, and the then living issue (which we have seen means children) of *any* grandchild to take *per stirpes* the interest (or share) which the parents would have taken if the property had then been divided among all his grandchildren. The trust as to the

rents would cease as to any interest in the property upon such interest being taken as 'heir-at-law of the testator.'

"This bill is brought by complainants, as heirs-at-law, attacking the will as invalid and praying that it be so declared. The complainants are Kate Stark and her husband, and Katie Kirby (*nee* Madison) and her husband, and Arvilla Madison. The bill cannot be maintained by Katie Kirby and her husband and Arvilla Madison, because they are beneficiaries named in the will and have taken their share of the rents. They cannot take under the will as devisees and then contest it as heirs-at-law. (110 Ill. 223; 122 *id.* 528.)

"It follows that the demurrer in this case must be sustained, and the motion for a receiver denied."

For the reasons above stated the decree of the circuit court of Cook county is affirmed.

*Decree affirmed.*

## THE CHEMICAL NATIONAL BANK OF CHICAGO

*v.*

## THE WORLD'S COLUMBIAN EXPOSITION.

*Opinion filed November 8, 1897.*

1. **BANKS**—*when acceptance of dividends on claim allowed by comptroller does not work estoppel.* A depositor in an insolvent national bank is not estopped, by accepting dividends on part of his claim allowed by the comptroller; from suing for the part disallowed, where the part disallowed was in dispute and was thrown out by the comptroller, leaving the depositor, if dissatisfied, to submit his right to that part to a court of competent jurisdiction.

2. **CONTRACTS**—*banks—insolvency of bank a breach of contract to carry on banking business.* Where a national bank contracts with an exposition company to carry on a branch banking business upon the exposition grounds, the subsequently declared insolvency of the bank terminates its capacity for doing business, and no further act is necessary to fix its liability for a breach of the contract.

*Chemical Nat. Bank v. World's Columb. Ex.* 67 Ill. App. 169, affirmed.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

HIRAM T. GILBERT, for plaintiff in error:

One who takes the benefit of a judgment or decree by receiving the money awarded him, cannot afterwards prosecute an appeal or writ of error to reverse such judgment or decree. The acceptance of the money operates as a release of errors. *Thomas v. Negus*, 2 Gilm. 700; *Morgan v. Ladd*, id. 414; *Ruckman v. Alwood*, 44 Ill. 183; *Corwin v. Shoup*, 76 id. 246.

A party who accepts the benefit of a judgment or other award is estopped from questioning its validity in a collateral proceeding. *Kile v. Yellowhead*, 80 Ill. 208; *Pool v. Breese*, 114 id. 594; *Town v. Blackberry*, 29 id. 137.

A claim against an insolvent national bank, when allowed by the comptroller and accepted by the claimant, has the force of a judgment. *Bank v. Bank*, 94 U. S. 437; *White v. Knox*, 111 id. 784.

WALKER & EDDY, for defendant in error.

Mr. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

A careful consideration of the record in this case convinces us that the opinion of the Appellate Court by Mr. Justice SHEPARD contains a fair and just statement of the facts and a carefully expressed exposition of the law applicable to those facts. That opinion is herewith appended, and adopted by this court as its opinion. It is as follows:

"This writ of error is prosecuted to reverse a judgment of \$7500 recovered against the plaintiff in error and in favor of the defendant in error, upon a trial had before the court below, without a jury. The cause was tried upon an agreed statement of facts, the substance of which,

so far as necessary to be considered here, and the points urged against the judgment, we take from the brief of the plaintiff in error, as follows:

"On July 7, 1892, the plaintiff, a corporation organized for the purpose of conducting the Columbian Exposition, entered into a contract in writing with the defendant, a national banking association organized under the laws of the United States, by which the plaintiff on its part agreed to set apart and allot to the defendant certain premises in the administration building in Jackson Park, and to grant and concede to the defendant the exclusive right to conduct a general banking business and maintain safe deposit vaults upon the premises from the day the premises should be ready for occupancy during and until the close of the World's Columbian Exposition, or for so long thereafter as the plaintiff might deem expedient. The plaintiff further agreed that it would not permit any person or persons, corporation or corporations, to carry on the business of cashing drafts or issuing exchange or receiving deposits upon the exposition grounds. The defendant, on the other hand, agreed, for and in consideration of the grant of the above mentioned privileges, to pay the defendant the sum of \$11,500 in installments, as follows, to-wit: \$2000 February 1, 1893; \$2000 March 1, 1893; \$2000 April 1, 1893; \$2500 May 1, 1893, and \$3000 June 1, 1893. The defendant further agreed that it would commence the full operation of business under the privileges granted in the contract on or before the 15th day of April, 1893, and maintain the same continuously during the exposition. The contract contained no provision respecting the remedy that might be adopted by either party in case of a breach of any of the terms of the contract by the other.

"On April 17, 1893, defendant entered into possession of the premises mentioned in the agreement and established therein a branch office of its bank, conducting and carrying on a general banking business, receiving as de-



posits large sums of money from the plaintiff, concessionaires, exhibitors and other connected with the World's Columbian Exposition. It paid plaintiff on account of the contract \$2000 February 1, 1893, \$2000 March 1, 1893, and \$2000 April 1, 1893, but never made any further payments.

"On May 9, 1893, defendant became insolvent, and by direction of the comptroller of the currency a bank examiner took possession of its assets and property, and its business of banking was entirely suspended and was never thereafter resumed. The premises mentioned in the contract were closed, and the deposits were removed to the main banking office of defendant in Chicago. The bank examiner retained the management of the assets and property until July 21, 1893, when one John P. Hopkins was appointed receiver by the comptroller of the currency and assumed the management thereof. Hopkins resigned January 13, 1894, and one Elie C. Tourtelot was appointed receiver in his place. Tourtelot continued to act as receiver until February 15, 1896, when he resigned, and one William C. Niblack was appointed receiver and entered upon the discharge of his duties as such, and has ever since continued to act and is still acting as receiver.

"On May 9, 1893, being the date of its suspension, plaintiff was a depositor of defendant to the amount of \$29,343 deposited in its name, and to the further amount of \$500 deposited in the name of plaintiff's paymaster. On the same date one Newton Wilcoxen was a depositor to the amount of more than \$1000, and afterwards, on July 5, 1893, Wilcoxen drew his check on the defendant for \$1000, payable to the plaintiff's order, and delivered the same to plaintiff.

"On June 23, 1893, plaintiff, through its proper officer, made demand upon the national bank examiner for the possession of the premises described in said contract. Thereupon, in pursuance of said demand, and by direction of the comptroller of the currency, the national bank

examiner surrendered up possession of the premises, and after that date defendant did not itself, or by any agent or receiver, have control of the premises or any part thereof, but on the contrary, from and after that date until the close of the World's Columbian Exposition on November 1, 1893, the plaintiff, or the Northern Trust Company of Chicago, had exclusive possession of the premises, and the Northern Trust Company, during said period, carried on in said premises a general banking business, with the express permission of the plaintiff.

"After defendant had become insolvent and suspended business, plaintiff entered into negotiations with other banks and banking institutions for the purpose of establishing a branch bank on the premises, and to this end entered into a contract with the Northern Trust Company, under which said trust company undertook and agreed to open a branch office and conduct a general banking business on said premises when the defendant should surrender possession thereof, but upon the condition that said Northern Trust Company should not be required to pay any rent for the use of said premises or for any rights or privileges that had been reserved to the defendant. Plaintiff made application to other banks and banking institutions for the prosecution of said business during the remainder of the term of said exposition, but was wholly unable to obtain any other or more favorable terms from any responsible bank than those offered by said Northern Trust Company. At the time plaintiff demanded possession of the premises from the bank examiner, the bank examiner and the directors of defendant made the claim that in consideration of such surrender of possession defendant should be repaid a portion of the amount that had theretofore been paid by it to plaintiff on account of the contract, but the plaintiff declined to recognize such claim or to repay any portion of said money.

"On September 26, 1893, plaintiff presented and filed with Hopkins, receiver, its sworn proof of claim, in and

by which it claimed a balance due it on account of its deposit, amounting to \$29,343, the amount of the check delivered to it by Wilcoxon on July 5, 1893, amounting to \$1000, and the amount of the deposit standing in the name of its treasurer amounting to \$500, making a total of \$30,843 then claimed by the plaintiff. After this claim was filed the defendant's receiver insisted there should be deducted therefrom the sum of \$2775, on the ground, as he claimed, that defendant should only be charged with such a proportion of the entire sum provided to be paid under its said contract as the time from April 17, 1893, to June 23, 1893, bore to the entire period from April 17, 1893, to November 1, 1893, which, as said receiver claimed, would amount to \$3225, deducting which from the \$6000 already paid, would leave the \$2775 which the receiver claimed should be deducted. Subsequently the receiver expressed himself willing to allow the claim if plaintiff would first allow a credit thereon of \$2100. Failing to reach an agreement with the receiver, the attorney of the plaintiff, on January 15, 1894, communicated by letter with the comptroller of the currency relative to the differences between the plaintiff and the receiver, and requesting directions to the receiver before taking further action in the matter. In answer to this letter the comptroller, on February 5, 1894, wrote to the plaintiff's attorney, in substance, that after hearing from the receiver and after having given the matter careful consideration he was of the opinion that if the receiver could effect a compromise by deducting \$2100 from the claim he would be justified in doing so, but that if this could not be done the proper course for him to pursue would be to deduct from the claim the entire \$6000 paid by the defendant to the plaintiff and allow it for the balance of \$23,843, leaving it to the plaintiff, if dissatisfied, to adopt such course as it might see fit for the determination of the rights of the parties by a court of competent jurisdiction. Subsequently, and on February 13, 1894, plaintiff's claim was allowed to the amount

of \$23,343, and the receiver issued and delivered to plaintiff a receiver's certificate therefor, which receiver's certificate was accepted by the plaintiff, and on February 15, 1894, plaintiff received from the comptroller of the currency, out of the funds of the defendant in the treasury of the United States, two dividends on the claim so allowed, aggregating the amount of \$16,340.10. On April 12, 1894,—nearly two months after the acceptance by the plaintiff of these dividends,—it commenced the present suit. Subsequently, on June 26, 1894, plaintiff accepted a further dividend of \$2334.30, and on August 9, 1895, a further dividend of \$1167.15, making in all \$19,841.55 received by plaintiff as dividends on the claim so allowed.

“Upon the foregoing facts the defendant insisted that the plaintiff was not entitled to recover: First, because by its acceptance of dividends on the claim as allowed before the commencement of its suit, plaintiff had estopped itself from asserting any further claim against the defendant, or insisting that the action of the comptroller was erroneous; second, because the amount of its claim as allowed, and upon which it had received dividends, was all the plaintiff was legally entitled to.

“The first proposition, presenting, concededly, a new question, claims serious consideration. Section 5234 of the Revised Statutes of the United States provides for the appointment by the comptroller of the currency of a receiver for an insolvent national bank. Section 5235 provides for the giving of notice by the comptroller, by advertisement, to creditors to present their claims. Section 5236 is as follows: ‘From time to time after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid

over to him, shall make further dividends on all claims previously proved or adjudicated, and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.'

"It has been held that under this section the creditor was at liberty to present his claim to the comptroller for allowance, and that in case the comptroller refused to allow the claim the creditor might bring suit thereon against the banking association in any court of competent jurisdiction, (*Bank of Bethel v. Palquique Bank*, 14 Wall. 383,) and an attempt was made, in the same case, to procure a holding by the court that the remedy given by that section of the statute for proving claims before the comptroller of the currency excluded all other remedies. But the court refused to sustain the proposition in that behalf, on the ground that under the provisions of the section quoted it was as much the duty of the comptroller to make dividends upon claims that had been adjudicated in a court of competent jurisdiction as upon such as had been proved before him to his satisfaction, and denied that the adjudicated claims referred to in the act were only such as had been adjudicated prior to the appointment of a receiver; and accordingly held that 'claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction, as a means of establishing their validity and to determine the amount owed by the association.' But that decision, it will be seen, does not meet the exact case presented by the proposition of the plaintiff in error, that by the acceptance of dividends on a claim allowed by the comptroller an estoppel arose against asserting the claim against the insolvent association for an amount in addition to what had been allowed by the comptroller.

"Looking at the stipulated facts, we see that at the date of the suspension of the bank the defendant in error was a depositor therein to the extent of \$29,343 deposited

in its own name, and of \$500 deposited in the name of its paymaster. Subsequently it became the holder of a check for \$1000 drawn in its favor by one Wilcoxon, who was also a depositor in the bank to an amount in excess of the amount of the check. Defendant in error was, therefore, a creditor of the bank to the amount of \$30,843 for funds on deposit when the bank failed, and was such creditor when it made presentation of its claim for allowance. Against the claim as presented the bank urged its counter-claim for a part of the \$6000 it had paid on account of the concession it had received to occupy a banking office and do a banking business within the exposition grounds. Failing to come to an agreement as to such counter-claim, the comptroller allowed the claim of defendant in error for an amount equaling the \$29,343 on deposit in its name, less the whole \$6000 which had been paid by the bank on account of the concession, viz., for \$23,343, and overlooked or ignored the items of \$500 on deposit in the name of the paymaster of defendant in error and of \$1000 for which it held the check of Wilcoxon. The exposition was, therefore, subjected to a clear deprivation of \$1500 growing out of transactions entirely independent of and separate from its claim as a separate depositor in its own name, and was deprived of the \$6000 which had been paid to it by the bank on account of rent and the concession, and it was for these sums that the defendant in error sued, and obtained the adjudication in its favor that is brought up for review.

"Whatever the rule may be concerning the binding effect upon one of an election made by him to accept the benefit of a judgment or award in his favor upon an entire claim asserted by him, evidenced by his acceptance of subsequent dividends thereon or of payment thereof, still we must regard the suit or claim for this \$7500 as being so far separable from and independent of the claim of defendant in error as a general depositor of the bank as to permit a recovery in the suit, notwithstanding,

either before or pending such suit, dividends upon the claim as allowed by the comptroller were received. A fair construction, also, of the letter of the comptroller of February 5, 1894, to the attorney of the defendant in error, in which he says that he is of the opinion that if the receiver could effect a compromise and adjustment of the controversy by deducting \$2100 he would be justified in so doing, and adds: 'If, however, this cannot be done, the proper course for him to pursue will be for him to deduct from the claim the entire \$6000 paid by the bank to the exposition, and allow it for the balance of \$23,343, leaving to the exposition, if dissatisfied, to adopt such course as it may see fit for the determination of the rights of the parties by a court of competent jurisdiction,' coupled with the action taken by defendant in error in accepting the course indicated by the comptroller, seems to be very close to a stipulation that defendant in error should abide by the decision of the comptroller to the extent of \$23,343 and sue for the rest, if dissatisfied, and it is conceded by counsel for plaintiff in error that it would be competent to make such a stipulation. But we do not regard it to be necessary to hold that a stipulation to such effect was made. It is enough that the matters involved in the suit do not appear to have been passed upon by the comptroller in making the allowance ordered by him. He simply ordered that everything in dispute should be thrown out of consideration, leaving all such disputes to be settled by suit. Under such circumstances we do not regard the defendant in error as being estopped by anything it has done from the recovery it secured.

"The cases of *Chemical Nat. Bank v. Armstrong*, 59 Fed. Rep. 372, decided by the Circuit Court of Appeals for the Sixth Federal Circuit, and *White v. Knox*, 111 U. S. 784, are cases which, though not in precise point, appear by analogy to establish that estoppel will not operate in a case like the present. But we take time only to refer to them.

"Upon the second point, which involves the right of the defendant in error to have the \$6000 which had been paid to it by the bank on account of rent and concession, it is urged that there was no lawful rescission by the defendant in error of its contract with the bank, and, because there was not, that defendant in error could not repudiate the contract and also retain the benefits it had received thereunder. We will not follow out the argument of the plaintiff in error upon that point, but content ourselves with holding that from a full inspection of the stipulated facts it appears that there was an admitted breach of the contract by the bank to such an extent as to put an end to its further execution by the bank, and that there had occurred a total disability of the bank to perform the objects for which the contract was entered into. Upon the insolvency of the bank being declared its capacity to do business was at an end and the contractual relation between the parties ceased, except for purposes of an action for damages for breach of contract. (*White v. Knox, supra*; *Lake Shore and Michigan Southern Railway Co. v. Richards*, 152 Ill. 59.) That the defendant in error suffered damages was amply shown by the stipulation that it was thereafter unable to procure a bank capable of doing the business contemplated by the contract, at any rent whatever to be paid.

"Under the agreed facts it would seem that there can be no doubt but the defendant in error had the right to take possession of the premises after the total breach by the bank of its contract, as it did do under the direction of the comptroller, without having deducted from its claim what had been paid to it for rent and concession.

"Upon the whole record the judgment should be affirmed, and it is so ordered."

The judgment of the Appellate Court affirming the judgment of the circuit court of Cook county was proper, and it is therefore affirmed.

*Judgment affirmed.*



ADOLPH LARSON *et al.*

v.

THE PEOPLE *ex rel.* Kochersperger, County Treasurer.*Opinion filed November 8, 1897.*

1. SPECIAL ASSESSMENTS—*when omissions from record are presumed to have been supplied by evidence.* Where a confirmation judgment entered by default recites a finding of jurisdictional facts, it will be presumed, on appeal from a proceeding to sell the property for the tax, that the omission of a signature to the *jurat* attached to the affidavit of mailing notices was supplied by other evidence.

2. SAME—*effect where assessment roll is signed by two commissioners, only.* A confirmation judgment entered by default cannot be collaterally attacked in a proceeding to sell the property for the delinquent assessment, on the ground that the assessment roll was signed by two commissioners, only.

WRIT OF ERROR to the County Court of Cook county;  
the Hon. ORRIN N. CARTER, Judge, presiding.

VICTOR ELTING, for plaintiffs in error.

J. D. ADAIR, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

To reverse a judgment of sale rendered in the county court of Cook county on application of the county treasurer, against certain property of plaintiffs in error, for the unpaid first installment of a certain special assessment, the plaintiffs in error have prosecuted this writ of error to this court. Only two points are relied on for reversal: First, that the assessment roll upon which judgment of confirmation was rendered was wholly irregular and void, and that the judgment of confirmation based thereon cannot be sustained because the roll, and the certificate to the same, were signed by only two commissioners; and second, that the affidavit of mailing notices in the same proceeding was of no effect because there was no signature affixed to the *jurat*.

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It will be perceived that this is an attempt to attack a judgment in a collateral proceeding. Notice by mailing, posting and publication are all essential to jurisdiction to render a judgment of confirmation in a special assessment proceeding. (*McChesney v. People*, 145 Ill. 614.) It was held in *Kruse v. Wilson*, 79 Ill. 233, that an affidavit in attachment without the signature of the officer before whom the oath was taken was not void, and could only be attacked in a direct proceeding. A summons had been issued on such affidavit, in which it was recited that the affidavit had been made, and the court said (p. 237): "If an oath was administered, and by the proper officer, as it assuredly was, the law was satisfied, and the mere omission of the clerk to put his name to an act which was done through him as the instrument should not prejudice an innocent party who has done all he was required to do." In the present case, although there was no signature to the *jurat* on the blank line left for that purpose, there was an impression of a seal below, showing these words: "John S. Sheahan, Notary Public, Cook Co., Ill." The order of default of the county court finds "that the commissioners heretofore appointed to make said assessment have complied with all the requirements of the law as to posting and sending notices to the owners of the property assessed, and that due notice, as required by law, has been given of this application, and of the making and return of the said assessment, and of the time for the final hearing thereon." It might have been proved extrinsically in the assessment proceedings that the oath was in fact taken. (1 Ency. of Pl. & Pr. 318.) In view of the rule so often announced by this court, that when the judgment recites the finding of the jurisdictional facts it will be presumed that any omissions appearing on the face of the record were supplied by other evidence, (*Dickey v. People*, 160 Ill. 633,) this point is overruled.

The court having jurisdiction, the judgment of confirmation rendered was not void, and could, at most, only

have been erroneous. In *People v. Markley*, 166 Ill. 48, the point was raised that only two of the commissioners appointed by the city council had signed the estimate of the cost of the improvement, and it was there held that the defect was not one which affected the jurisdiction of the court, and while the court might have erred in rendering the judgment of confirmation on the petition without amending it, the action of the court was a mere error, which cannot be availed of on application for judgment against delinquent lands. In a direct attack such omission has been held fatal. In *Adcock v. City of Chicago*, 160 Ill. 611, it was said: "It has been decided that the statute requires that the commissioners appointed to make a special assessment shall act jointly, and that action by two of them cannot be sustained. The same rule must be applied with respect to the commissioners appointed to estimate and report the cost of the improvement. There is no ground upon which a distinction in that respect between the two sets of commissioners could rest." In the present case, the affidavits of mailing and posting, and the certificate of publication, showed that all three commissioners signed the notices given and all three of them took the necessary oath, but only two signed the assessment roll and the certificate to the same. The notices sent to the persons assessed informed them of the return of the assessment roll into court, as did also the notices published and posted, and these were signed by all three commissioners.

On the authority of *Adcock v. City of Chicago*, *supra*, and *People v. Markley*, *supra*, we must hold that this defect in the assessment roll in nowise affected the jurisdiction of the court, and if it was erroneous for the court to render judgment of confirmation on such a roll, still such judgment cannot be attacked collaterally.

The judgment will therefore be affirmed.

*Judgment affirmed.*

JOSEPH WALTER

v.

MATILDA WAY *et al.**Opinion filed November 8, 1897.*

1. DEEDS—the essence of delivery is the intention of the parties. To make the delivery of a deed valid it must be manifest that the grantor intended the grantee to become possessed of the estate.

2. SAME—delivery to third person for grantee must be absolute. Delivery of a deed to a third person for the grantee must be absolute to be a good delivery, and if the grantor retains a future control of the deed no estate passes.

3. SAME—deed intended to operate as a will must be executed with formalities of a will. A deed which is intended by the grantor to operate precisely as a will must be executed and witnessed in accordance with the provisions of the Statute of Wills, in order to be valid.

4. EVIDENCE—evidence held insufficient to show delivery of deed to third person for grantee. The delivery of a deed to a third person for the grantee is held by the court, after full consideration of the evidence in this case, not to be sufficiently established.

APPEAL from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

ELMER DEWITT BROTHERS, (LUTHER LAFLIN MILLS, of counsel,) for appellant:

Delivery of a deed is essential to the transfer of title by such an instrument, but actual dispossession by a grantor of the instrument is not invariably necessary. Delivery is that part of the operation in executing a deed by which the grantor signifies his intention when and how it is to take effect. Williams on Real Prop. 147.

Although delivery is made the supreme test in determining the intent of a grantor to pass title by the instrument, the question of delivery itself becomes one of intention, and the rule is that it is complete when there is a clearly manifested intention on the part of the grantor to make the instrument his deed. *Jordan v. Davis*, 106 Ill. 336; *Rawson v. Fox*, 65 id. 200; *Stevens v. Hatch*, 6 Minn. 64; *Vaughn v. Godman*, 94 Ind. 191; 1 Devlin on Deeds, sec. 262.

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Intention is a controlling element, and it may be manifested by acts alone, by words alone, or by both, either concurrent or successive. *Hill v. Hill*, 119 Ill. 242; *Mastersson v. Cheek*, 23 id. 72; *Walker v. Walker*, 42 id. 311; *Byars v. Spencer*, 101 id. 429; *Otis v. Spencer*, 102 id. 622; *Provart v. Harris*, 150 id. 40; *Bryan v. Wash*, 2 Gilm. 262.

The question whether there was a delivery of the deed or not, so as to pass title, must, in a great measure, depend upon the peculiar circumstances of each particular case. The question of delivery is one of intention. *Jordan v. Davis*, 108 Ill. 336; Devlin on Deeds, sec. 262.

Delivery of a deed to a third person, to be held until the grantor's death, will vest title in the grantee, and upon the death of the grantor the deed will take effect and relate back to the time of the first delivery. Devlin on Deeds, sec. 280; *Stone v. Duvall*, 77 Ill. 475.

Where a deed is delivered to a third party to be delivered to the grantee upon the happening of some event, it will not take effect as a deed until the second delivery, but when thus delivered it will take effect by relation from the time of the first delivery, and title will pass as of that time. *Stone v. Duvall*, 77 Ill. 475; *Ball v. Foreman*, 37 Ohio St. 132; *Foster v. Mansfield*, 3 Metc. 412; *Latham v. Udell*, 38 Mich. 238.

Delivery and acceptance may be simultaneous, as where delivery is made directly to the grantee in person; or they may be successive, as where the delivery is to a third person. But acceptance cannot occur before delivery. *Insurance Co. v. Campbell*, 95 Ill. 267.

H. H. TALCOTT, for appellees:

If the deed is not delivered in the lifetime of the donor no title passes. *Hoig v. Adrian College*, 83 Ill. 267; *Cline v. Jones*, 111 id. 563; *Byars v. Spencer*, 101 id. 429.

There must be an unqualified delivery in some way,—an acceptance by the grantee. The title must be presently vested in the grantee without any conditions. *Mas-*

*terson v. Cheek*, 23 Ill. 76; *Basket v. Hassell*, 107 U. S. 602; *Stinson v. Anderson*, 96 Ill. 373; *Hayes v. Boylan*, 141 id. 400.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is a bill, which, as originally drawn and subsequently amended, was filed by the appellant, Joseph Walter, against the appellee, Matilda Way and others, for the purpose of establishing in appellant the ownership of two lots in the village of Desplaines in Cook county. The appellees are the brothers and sisters and nephews and nieces of one Christopher Haverly, for many years a resident of said village of Desplaines. Christopher Haverly died at Desplaines at the age of about seventy-one years on April 8, 1893, unmarried and intestate, and leaving the appellees as his only heirs-at-law. He kept a livery stable which was situated upon the premises owned by him. There was also a house upon said premises in which he sometimes lived. At the time of his death the premises were rented to one Winchell. On June 3, 1890, Christopher Haverly made a deed of the lots in question to the appellant, Joseph Walter. Joseph Walter was a harness maker, living in the village near the premises of Christopher Haverly. The appellant was an intimate friend of the deceased, Haverly; and Haverly entertained for him a high degree of regard and affection. During the last year, or year and a half of Haverly's life, he lived in some rooms over the harness shop of the appellant.

The appellant claims to be the owner of the lots in question, by virtue of the deed so executed by Haverly on June 3, 1890. The appellees claim to be the owners, as heirs of Haverly, and contend that the deed executed to the appellant was never delivered to the grantee therein, and, therefore, never took effect as a valid conveyance. The only question in the case is, whether or not there was a delivery of the deed to the appellant. The circuit court, before whom the cause was heard, found that there

was no delivery of the deed, and dismissed the bill for want of equity.

The question as to what constitutes the delivery of a deed has often been passed upon by this court. A delivery is necessary to render a deed operative. It has been held, that no particular form or ceremony is required to constitute a sufficient delivery. It has also been said, that a delivery may be by acts or words, or by both, or by one without the other. But it is well settled, that several things are necessary to constitute a valid or effective delivery of a deed. One of the essential requisites of a sufficient delivery is, that the deed pass beyond the dominion and control of the grantor. Another requisite is the intention of the grantor, and of the person to whom the deed is delivered, that it shall presently become operative and effectual. The essence of delivery is the intention of the parties. In order to make the delivery valid, it must be manifest that the grantor intended the grantee to become possessed of the estate. It is not essential in all cases, that the deed should be delivered into the actual possession of the grantee. It may be delivered to a third person for the benefit of the grantee. When the delivery is to a stranger for the benefit of the grantee, it must be absolute in order to be good. If a future control by the grantor is retained over the deed, no estate passes. When it is accepted by the beneficiary, the delivery is as good, when made to a third person for his benefit, as though made directly to him. Where a grantor makes a deed and delivers it to a third person to hold until his death, and then to deliver it to the grantee, and parts with all control over it, and reserves no right to recall the deed, or alter its provisions, the delivery in such case will be effective, and the grantee on the death of the grantor will succeed to the title. Although the delivery of the deed to such third person to be retained until the death of the grantor, and then to be delivered to the grantee, is not an absolute delivery, so as to vest an

immediate estate in the land, yet it will be good to pass the title at the grantor's death to the grantee or his heirs. (*Bryan v. Wash*, 2 Gilm. 557; *Byars v. Spencer*, 101 Ill. 429; *Cline v. Jones*, 111 id. 563; *Provart v. Harris*, 150 id. 40; *Stinson v. Anderson*, 96 id. 373; *Stone v. Duvall*, 77 id. 475; 2 Devlin on Deeds, secs. 262, 280).

The amended and supplemental bill in this case alleges, that the deed was delivered by Christopher Haverly to one Thomas Luce, as the agent for appellant. Upon looking into the record we are unable to find any such facts as, in our opinion, constitute a delivery of the deed to Luce, either as the agent of the appellant to receive the deed, or as the agent of Haverly to deliver the deed to appellant. On the night of April 8, 1893, in one of the rooms above appellant's harness shop Haverly was very sick, and Luce was present with him. Luce says he was satisfied that Haverly was going to die, and so told him. Luce then asked the deceased, if he had any papers to fix up, or if there was anything he wanted done, and told him that it would be better for him to do what he had to do at once. The deceased replied as follows: "When I went down east, I had all my papers fixed up before I went. I deeded those—that lot and barn and the house and lot—to Joseph Walter. I made another paper disposing of my personal property. Mr. Senne made them." Luce told him to send for Senne. He said to Luce, that he wanted the paper in reference to his personal property changed. Luce told him that he ought to do it at once, on that night. The deceased replied, "Oh, pshaw! wait until morning." Luce told him that he might not live until morning, and asked him where the papers were. The deceased replied, "They are in the other room in that tin box. It was a bread box, and there is a bread box sitting on top of it. It is there." The other room referred to was the kitchen, in which the deceased was in the habit of cooking his meals, and adjoined the bed-room in which he was sick. Luce asked him if Walter knew anything about



the deed. He replied, "Yes, he knows all about it." Luce asked him if the deed was on record. He said, "No; all he (Walter) has got to do with it is to take it and put it on record." While he and Luce were talking, the appellant and Winchell came into the room. Just before they entered the room, the deceased protested against sending for Senne that night, and said, "I don't want Winchell to know anything about this business at all. Don't get the man (Senne) out of bed in the middle of the night; we can do that to-morrow." Appellant and Winchell after a few moments went down stairs; thereupon the deceased proposed to fix up the matter the next day, and said that he would on the next day sell his horse and road cart for what he could get for them. He also said, "I don't want anybody to say anything about it. When I am gone that is the end of it. I don't want anybody to know the papers are made at all." Luce asked him what he wanted him, Luce, to do with those papers, and he answered, "I want you to take care of those papers." When Luce asked if he should not take them home with him, he said, "I want you to take care of them, so that they will not be destroyed." The deceased said: the deed "is in a bread box—a tin box—sitting in the kitchen with another box on top of it. The deed is there for Joe." Luce had not seen the deed, and did not know where it was, or where the box was which contained it. Haverly died that night, and, after his death, Luce asked the appellant if he knew where the box was, and the appellant replied that the deceased had told him all about the box. Luce then took the box, and subsequently delivered it to the probate court.

The foregoing is substantially all the testimony which connects Luce in any way with the transaction. It is evident that there was no delivery of the deed to Luce for the benefit of the appellant. The deceased merely informed Luce, that the deed was in a box in the adjoining room for the appellant, and that appellant, not Luce,

could take it and record it. There was no direction to Luce to take it and record it, but simply a statement that, after the death of Haverly, the appellant could take it and record it.

The evidence shows, that, for more than a year prior to the death of Haverly, the deed was in his possession in the tin box in the rooms occupied by himself. During all this time it did not pass out of his control. About June 3, 1890, the deceased made up his mind to go to New York where he had some relatives living. Before he left for New York, he sent for Henry C. Senne, a justice of the peace and police magistrate at Desplaines, with a view of making some arrangements in regard to his property. He stated to Senne, that he was going away, and did not know whether he should come back alive or not; that he had no desire to make a will, but wanted advice as to the proper method of disposing of his property without making a will. Senne took advice, and told him that, if he would make a deed and provide for the delivery of the deed, it would be a valid transaction. Senne advised him to have a deed made, and left in the hands of some one, in whom he had confidence, to be delivered in case he should not return. The deceased then spoke of the appellant in very high terms, and requested Senne to make out a deed to appellant. Senne thereupon drew a deed, which the deceased signed in his presence and acknowledged before him. The deceased took away the deed at that time, stating that he intended to leave it in the possession of Senne to be delivered to the appellant, in case the deceased should not come back. Subsequently the deceased rented a box in the vaults of the Fidelity Safety Deposit Company, and he and Senne and the appellant went together to the box, and the deed was deposited therein. The deceased handed one key to Senne and one key to the appellant, stating that, in case he should not come back, Senne should get the deed and deliver it to appellant. The deed at the same time was

placed in an envelope, and the envelope was sealed, and an endorsement was written upon it by Senne, and signed by the deceased, in these words: "I hereby deliver the within deed to Henry C. Senne, and direct that, in case of my death, said Senne is to deliver said deed to Joseph Walter.—Desplaines, June 3, 1890.—Christopher Haverly." The deceased remained in New York until about January 1, 1891, when he returned to Desplaines. Senne kept the key until such return, and then handed it back to the deceased. Senne says, that deceased did not ask for the key; that he took it for granted that the key belonged to him, and handed it back to him, and nothing was said about it. The appellant kept the key, which was delivered to him, until the expiration of the time for which the box was rented, which was one year. The deceased then surrendered the box, and took possession of its contents. He took the envelope with the enclosures from the box in the safety deposit vaults, and placed them in the tin box in the room occupied by him as above stated, and there they remained until his death.

Although the deed was placed under the control of Senne with instructions to him to deliver it to the appellant in case the deceased should not return from New York, yet Haverly subsequently withdrew the deed from the possession of Senne, and took it back into his own possession. It remained under his control from the time he so took it back into his possession until the time of his death, which occurred more than a year thereafter. In *Provart v. Harris, supra*, we said (p. 47): "It is indispensable, whatever means may be adopted to accomplish the delivery of a deed, that the deed pass beyond the dominion and control of the grantor; for, otherwise, it cannot be correctly said to come within the power and control of the grantee. \* \* \* If the grantor retains dominion and control over it, the deed is ineffectual for any purpose as a conveyance." The testimony shows, that, one of the essential requisites to constitute the valid and

sufficient delivery of a deed, namely, the parting by the grantor with all power and control and dominion over it, is here wanting.

The proof also shows that, although the deceased desired and intended the appellant to become the owner of the property at his death, yet his intention was not that the deed should become presently operative. The language used by him in his last conversation was to the effect that the property was to be the property of appellant at his death. He did not believe that he was going to die on the night on which he did die. His intended disposition of the property was of a testamentary character, and was not to take effect in his lifetime, but was ambulatory until his death. Such a disposition is inoperative, unless it is declared in writing in strict conformity with the statutory enactment regulating devises and wills. An instrument, which is intended by a party to operate precisely as a will, without being executed and witnessed as a will in accordance with the provisions of the Statute of Wills, will not be allowed to have the effect sought to be given to it. (*Cline v. Jones, supra; Hayes v. Boylan*, 141 Ill. 400).

The question, whether there is a delivery of a deed or not, depends greatly upon the intention of the grantor. This intention may be manifested by acts and declarations of the grantor, and by the circumstances attending the execution and the custody of the deed. (*Shults v. Shults*, 159 Ill. 654). Here, the deceased continued to exercise acts of ownership and authority over these premises after he executed the deed to the appellant. It is admitted that he kept possession of the property, and enjoyed the rents and profits of it, and paid the taxes thereon up to the time of his death. (*Cline v. Jones, supra*). All these acts indicated an intention to retain control over the deed and the property during his lifetime. In *Stinson v. Anderson*, 96 Ill. 373, where a grantor, after acknowledging a deed conveying his land to his three chil-

dren, left the same with the acting magistrate, requesting him to keep it for the grantor, and saying, if he wanted it, he would call and get it, but if he should die, requesting its delivery to the grantees or their guardian; and, after such deposit of the deed, the grantor and his wife executed a mortgage on the same land to a third person, it was held that this latter act was equivalent to a withdrawal of the deed for the purpose of making the mortgage, and, there being no subsequent act of the grantor showing an intention to make an absolute delivery, no title passed by the deed to the grantees. In *Hayes v. Boylan*, *supra*, the owner of land made and acknowledged a deed thereof to his three sons, Charles, John and Thomas; after which he handed the same to Charles, saying, "Take this deed and put it in our box in the bank;" the grantor did no other act showing an intention to deliver the deed, but requested Charles not to let the other grantees know anything about the matter until the grantor's death; he also retained possession and control of the land up to his death; it was held, that the direction given to Charles was not a delivery, but merely the employment of one of the grantees, as the agent of the grantor to do an act for him, whereby he could retain the custody of the deed during his lifetime; and that the instrument was void as a deed for want of delivery in the grantor's lifetime.

It is true, that the law presumes more in favor of the delivery of deeds in cases of voluntary settlements, particularly those made to infants, than it does in ordinary cases of bargain and sale. And the reason, why the law thus presumes in favor of the delivery of the deed in cases of voluntary settlements made to infants, is that the infant is incapable of doing any act in regard to the deed which he might not avoid on reaching his majority; and it is the duty of the parent, as his natural guardian, to accept and preserve the deed for him. Here the appellant was an adult, and no relationship like that of parent and child existed between Haverly and the appellant.

Other decisions hold, that, where the grantor intends to be understood as delivering the deed, or where he makes a grant and induces the grantee to go upon the premises and make improvements and take possession of the land, in such cases there may be a sufficient delivery; but in all these cases the principle is laid down, that the grantor loses all control over the deed as grantor, and that it becomes operative at once and invests the grantee with full title and control. (*Cline v. Jones, supra; Hayes v. Boylan, supra; Douglas v. West*, 140 Ill. 455).

After a careful consideration of the evidence in the case, and upon an application to that evidence of the rules laid down by this court in regard to what constitutes the delivery of a deed, we have reached the conclusion, that the deed to the appellant was not delivered in such a way as to make it a valid and operative conveyance; and that, therefore, the decree of the court below in dismissing the bill was correct.

Accordingly, the decree of the circuit court is affirmed.

*Decree affirmed.*

## THE CHICAGO AND ALTON RAILROAD COMPANY

v.

JOHN SCANLAN.

*Opinion filed November 1, 1897—Rehearing denied December 20, 1897.*

1. PLEADING—*when added count states a new cause of action—limitations.* A new count added to a declaration for personal injury originally alleged to have been caused by the faulty construction of a scaffold, which charges that the injury was caused by the negligent overloading of the scaffold, states a new cause of action, and, if filed more than two years after the injury, is obnoxious to the plea of the Statute of Limitations.

2. APPEALS AND ERRORS—*harmless error will not reverse.* Error in sustaining a demurrer to a plea of the Statute of Limitations interposed to a new count added to a declaration in a personal in-

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| 170 | 106 |
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| 170 | 106  |
| 98a | *215 |
| 170 | 106  |
| 94a | *102 |
| 170 | 106  |
| 198 | *504 |
| 99a | *883 |
| 170 | 106  |
| 197 | *516 |

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| 208   | *499 |
| 106a  | * 87 |
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| 111a | *292 |

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| 215 | *488 |

jury case is not ground for reversal, where such count is abandoned at the trial and no evidence given thereunder.

3. MASTER AND SERVANT—*elements necessary to warrant recovery for injury from defective appliances.* To warrant a recovery for injuries received by a servant from defective appliances the servant must show the existence of the defect, that the master knew or should have known of its existence, and that the servant did not know of the defect or have an equal means of knowledge with the master.

4. SAME—*duty to furnish safe appliances is a positive obligation.* The master's duty to his servant to furnish a reasonably safe structure or scaffold on which to work is a positive obligation, and the master is liable for the negligent performance of that duty, whether he undertakes its performance personally or through another servant. And this is true although such other servant might, for other purposes, be a fellow-servant.

5. SAME—*when foreman's knowledge of defects is chargeable to master.* Knowledge by the foreman of a gang of carpenters of the defective condition of a scaffold which he had aided in erecting for the use of brick masons is chargeable to the master.

6. FELLOW-SERVANTS—*what necessary to constitute the relation of fellow-servants.* To constitute the relation of fellow-servants it is essential that they be actually co-operating, at the time of the injury, in the particular work in hand, or that their usual duties should throw them into habitual association, so that proper caution would likely result.

*Chicago and Alton R. R. Co. v. Scanlan*, 67 Ill. App. 621, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

JAMES H. TELLER, for appellant:

The servant, in order to recover for defects in the appliances of the business, must establish that the appliance was defective, that the master had knowledge thereof or ought to have had, and that the servant did not know of the defect and had not equal means of knowing with the master. *Goldie v. Werner*, 151 Ill. 551.

It is error to suppose that a force of men cannot be engaged in a common service unless all are continuously working at the same time and engaged in doing precisely

the same kind of work. It is sufficient that they are all actually employed by the same master, and that the work of each, whatever it may be, has for its immediate object a common end or purpose, sought to be accomplished by the united efforts of all. *Abend v. Railroad Co.* 111 Ill. 202.

The builders of a scaffold about a ship and the riveters using the scaffold are fellow-servants. *Butler v. Townsend*, 126 N. Y. 105; *Beezley v. Wheeler Co.* 61 N. W. Rep. 658.

Stone masons and carpenters working for a common master in the building of a bridge are fellow-servants. *Bier v. Railway Co.* 31 N. E. Rep. 471.

Brick masons and carpenters working together upon a building are fellow-servants, where all are under charge of a foreman and employed by a common master. *Armour v. Hahn*, 111 U. S. 313.

WILLARD GENTLEMAN, and EDWIN W. SIMS, for appellee:

The duty to exercise reasonable care to see that the place furnished for a servant to work is reasonably safe is a positive obligation toward the servant, and the master is liable for any failure to discharge that duty, whether he undertakes that performance personally or through another servant. *Hess v. Rosenthal*, 160 Ill. 628; 55 Ill. App. 324; *Railroad Co. v. Godfrey*, 155 Ill. 82; Wood on Master and Servant, sec. 329; Shearman & Redfield on Negligence, secs. 87-92; Cooley on Torts, 561; *Mayhew v. Mining Co.* 76 Me. 100; *Railroad Co. v. Swett*, 45 Ill. 197; *Railroad Co. v. Welch*, 52 id. 183; *Railway Co. v. Conroy*, 68 id. 567; *Railway Co. v. Ingraham*, 77 id. 309; *Brick Co. v. Sobkowiak*, 184 id. 573; *Cribben v. Callaghan*, 57 Ill. App. 545; *Steel Co. v. Schymanowski*, 59 id. 33.

The master must furnish suitable means, appliances and instrumentalities for the performance by the employee of the labor required. *Syrup Co. v. Carlson*, 155 Ill. 215; *Monmouth Mining Co. v. Erling*, 148 id. 521; Wood on



Master and Servant, sec. 329; Cooley on Torts, p. 559, sec. 7; *Railroad Co. v. Wangelin*, 43 Ill. App. 324.

The duty of furnishing safe appliances and a safe place to work is non-assignable, so as to relieve the master from liability. *Railroad Co. v. Kneirim*, 152 Ill. 464; *Rice v. Paulsen*, 51 Ill. App. 126; *Goldie v. Werner*, 50 id. 300; *Norton v. Volzke*, 158 Ill. 402; 54 Ill. App. 545; *Railroad Co. v. Godfrey*, 155 Ill. 82; *Stringham v. Stewart*, 100 N. Y. 516; *Benzing v. Steinway*, 101 id. 552; *Pantzar v. T. F. I. M. Co.* 99 id. 369; *Kranz v. Railroad Co.* 123 id. 4; *Moynihan v. Hills*, 146 Mass. 582.

An employee has the right to act upon the theory that his employer has used reasonable diligence to provide reasonably safe appliances; and, himself using ordinary care, if his attention has not been called to a defect or danger, and the same is not obvious, he is not chargeable with notice of insecurities which only could be discovered by careful inspection. *Rice v. Paulsen*, 51 Ill. App. 124; *Goldie v. Werner*, 50 id. 297; *Railroad Co. v. Walter*, 45 id. 642; *Wood on Master and Servant*, sec. 385; *Patterson v. Railroad Co.* 76 Pa. St. 389.

The master or his foreman will be presumed to know and be familiar with the dangers, latent and patent, ordinarily accompanying his business. The law will imply and infer notice of any defect which, by the use of ordinary care, might have been known to the master. *Wood on Master and Servant*, secs. 330, 347; *Coal Co. v. Haenni*, 146 Ill. 625; *Smith v. Car Works*, 50 Mich. 504; *Coombs v. N. B. C. Co.* 102 Mass. 572.

To constitute persons fellow-servants it is essential that, at the time it is claimed such relation exists, they shall be directly co-operating with each other in the particular business at hand, or that their usual duties shall bring them into habitual association, so that they may exercise an influence upon each other promotive of proper caution. *Railroad Co. v. Moranda*, 93 Ill. 302; 108 id. 576; *O'Leary v. Railroad Co.* 52 Ill. App. 643; *Railroad Co. v.*

*Kneirim*, 152 Ill. 466; *Rolling Mill Co. v. Johnson*, 114 id. 57; *Stafford v. Railroad Co.* id. 244; *Railroad Co. v. Geary*, 110 id. 383; *Railroad Co. v. Snyder*, 117 id. 376; 128 id. 655; *Railroad Co. v. Hoyt*, 122 id. 369; *Steel Co. v. Shields*, 134 id. 209; *Railroad Co. v. Kelly*, 127 id. 637; *Coal Co. v. Holmquist*, 152 id. 591.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an action brought by John Scanlan, against the Chicago and Alton Railroad Company, to recover for a personal injury received while in the employ of the railroad company as a brick mason, in building a round-house in Chicago. While the plaintiff, with others, was working on the round-house, a scaffold upon which he was standing gave way and he was thrown to the ground, a distance of twenty-five feet, and injured.

The original declaration contained one count, in which it was averred that the scaffold broke and fell owing to its faulty and improper construction by the defendant. Subsequently, but after the expiration of two years, plaintiff, by leave of the court, filed an amended declaration, consisting of two counts. In the first count plaintiff set up the defective construction of the scaffold of poor material, substantially as was done in the original declaration. In the second count the negligence charged was that the scaffold was overloaded by the defendant. To the amended declaration the defendant pleaded the Statute of Limitations, to which the plaintiff demurred and the court sustained the demurrer, and this decision of the court is relied upon as error.

As to the first count of the amended declaration, it was but a mere re-statement of the cause of action as set out in the original declaration, and, as has been often held, the Statute of Limitations was not a good defense. As to the second count of the amended declaration, we are inclined to the opinion that it set up a new cause of action, and the Statute of Limitations was a good defense to the matters therein set up for the first time during

the progress of the case. But on the trial no evidence whatever was introduced under this count, and while the court erred in sustaining a demurrer to the Statute of Limitations pleaded to this count, it was an error that did no harm, as the count was abandoned on the trial of the cause.

It is next claimed in the argument that the court erred in refusing, at the close of all the evidence, to direct a verdict for the defendant. In *Goldie v. Werner*, 151 Ill. 551, following the rule laid down in *Wood on the Law of Master and Servant*, it was held that a servant, in order to recover for an injury for defects in the appliances used in the business, is required to establish three propositions: First, that the appliances were defective; second, that the master had notice thereof, or knowledge, or ought to have had; and third, that the servant did not know of the defect and had not equal means of knowing with the master. It is claimed by counsel for the appellant that there is no evidence in the record tending to establish either the second or third proposition.

It is apparent from the evidence that the scaffold was defective, and, as constructed, unsafe. Daniel Glennon testified: "I noticed the scaffold that fell; it was not built strong enough; the uprights were old telegraph poles; I had my attention called to the foot-locks that morning by a bricklayer that was looking for a job; there was not enough of them; \* \* \* there should be four or five foot-locks; \* \* \* on the scaffold that fell there was only three; \* \* \* there were no braces at all under the foot-locks." Patrick Farrell says: "There were pieces cut to put on under the foot-locks, for to hold them up, about two feet long, and nails put in them; it was too late Saturday evening to put them in and they were thrown up; them pieces were not put on; they were thrown up on the top of the scaffold until Monday morning—three pieces that should go under; I saw those pieces cut and got ready to put in a certain place on that scaffold, and

they were not put in on Saturday night." Thomas Roach says: "I saw there was no bracing under the foot-locks; the outside upright where it gave away was an old telegraph pole."

In regard to the second proposition,—that plaintiff must introduce evidence tending to prove that the master had notice of the defect, or knowledge, or ought to have had,—it appears from the record that on May 15, 1893,—the day the scaffold fell,—appellee was one of six bricklayers working on a scaffold in a round-house being built for the appellant. The scaffold, which was one of a series built around the round-house for the use of the bricklayers, had been put up on Saturday, May 13, by two carpenters in the employ of the appellant. Paul Ryan was foreman of the bricklayers and John N. Eisinger was foreman of the carpenters. The latter and a man named Kelly put up that part of the scaffold on Saturday afternoon which fell on Monday morning. The evidence tends to show that the carpenters who were erecting the scaffold quit work at 5:20 o'clock Saturday afternoon in order to catch a train which left at that hour for their homes, before they had entirely finished the scaffold. The braces were not put under the foot-locks. They were prepared and nails driven into them, and then thrown up upon the scaffold. The carpenters, no doubt, intended to return early Monday morning before the bricklayers commenced work, and nail on the foot-locks, but the carpenters did not get back until after eight o'clock,—the hour when the masons were called to go upon the scaffold and resume work. Appellee was employed by the railroad company to work as a bricklayer on the round-house it was erecting. It was the duty of the railroad company to exercise reasonable care to see that the scaffold provided for its employees to work upon was reasonably safe. That duty was entrusted to Eisinger, the foreman or vice-principal of the defendant. Whatever knowledge Eisinger, the foreman, possessed in regard to the defect in the scaffold

the railroad company is chargeable with. Here Eisinger assisted, as foreman, in the erection of the scaffold, and knew, or was bound to know, its defects and imperfect construction, and as he stood in the place of the railroad company, it follows that the company had notice. (*Goldie v. Werner, supra.*) In *Hess v. Rosenthal*, 160 Ill. 621, following the rule laid down in Wharton on the Law of Negligence, (sec 211,) it was held that the duty to exercise reasonable care to see that the place furnished for a servant to work in is reasonably safe is a positive obligation toward the servant, and the master is liable for any failure to discharge that duty, whether he undertakes that performance personally or through another servant. We think there was ample evidence introduced by plaintiff tending to prove the second proposition, that the master had notice of the defective condition of the scaffold.

As to the third proposition,—that appellee did not know of the defect and had not equal means of knowing with the master,—it will only be necessary to allude briefly to the facts. It appears that in working on the round-house, as soon as the brick masons finished one part of the wall they moved on around the building to another part, where, in the meantime, the gang of carpenters had erected a scaffold for their use. They had neither time nor opportunity to inspect every new piece of scaffold that was erected. Moreover, on the morning the scaffold fell appellee had gone upon the roof of the round-house on a ladder, which was on the side of the round-house opposite the scaffold, and when the foreman in charge of the work called time at eight o'clock, appellee stepped down from the roof onto the scaffold, and so had no opportunity of examining the same and knew nothing of its defects.

But it is said that the carpenters who constructed the scaffold were fellow-servants of the bricklayers. If that were conceded to be true, the fact would not absolve appellant from liability. The duty to use reasonable care

for the safety of the structure upon which appellee was required to work was one owing directly by appellant to appellee, of which it could not divest itself by any delegation to others, and the rule in that regard is quoted above from the opinion in *Hess v. Rosenthal*. In such a case the duty rests upon the master, and a negligent performance of it is his negligence, by whomsoever performed. *Bricker v. New York Central Railroad Co.* 2 Lans. 506; *Chicago and Northwestern Railway Co. v. Jackson*, 55 Ill. 492; *Columbus, Chicago and Indiana Central Railway Co. v. Troesch*, 68 id. 545; *Chicago and Northwestern Railway Co. v. Sivett*, 45 id. 197; *Chicago, Burlington and Quincy Railroad Co. v. Avery*, 109 id. 314; *Monmouth Mining and Manf. Co. v. Erling*, 148 id. 521; *Mobile and Ohio Railroad Co. v. Godfrey*, 155 id. 78; Cooley on Torts, 561.

It is also claimed that the court erred in giving and refusing instructions. Under this head it is claimed in the argument that the second proviso of plaintiff's first instruction was liable to mislead the jury. We do not concur in that view. It reads: "Provided, also, the jury believe, from the evidence, that the defendant failed to exercise reasonable care in making the scaffold safe, if the jury believe, from the evidence, that it was not safe," etc. It is said, although the scaffold was safe as constructed on Saturday, yet if it had been tampered with between that time and the time of the accident the jury might conclude defendant was negligent, unless it was shown to have used some care in restoring it to a safe condition. From the language of the proviso we do not think any such inference as suggested could be drawn.

What has been said concerning the doctrine of fellow-servants disposes of the alleged error in refusing appellant's last instruction, relieving it from liability if the carpenters were found to be fellow-servants of appellee. It was not error to refuse the instruction.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

CHARLES BROKAW

v.

ALEXANDER OGLE *et al.**Opinion filed November 8, 1897.*

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1. **HOMESTEAD**—*homestead right may exist in an undivided interest in land.* An undivided interest in land, accompanied by exclusive possession, will support a right of homestead in one of the co-tenants. (PHILLIPS, C. J., dissenting.)

2. **SAME**—*two estates of homestead cannot exist together in same land.* Two separate estates of homestead cannot exist in the same land at the same time.

3. **SAME**—*remainder-man cannot acquire homestead during existence of life estate.* An heir entitled to the reversion cannot acquire a homestead interest in land during the existence of the widow's homestead therein.

4. **JUDICIAL SALES**—*interest of heir may be sold subject to homestead right of life tenant.* An heir's undivided interest in land may be levied upon and sold subject to the homestead right of the widow therein.

5. **SAME**—*inadequacy of consideration alone is not ground for setting aside a sale.* Mere inadequacy of consideration will not justify a court of equity in setting aside a judicial sale, where there are no circumstances of fraud or irregularity attending it.

6. **PARTITION**—*premises may be partitioned subject to dower and homestead.* Premises inherited by heirs may be partitioned subject to the right of dower and the homestead estate of the widow.

**APPEAL** from the Circuit Court of Pike county; the Hon. JEFFERSON ORR, Judge, presiding.

This is a bill for partition filed by appellant on June 20, 1895, and subsequently amended, to which, as originally drawn and as subsequently amended, Alexander Ogle and Hiram Ogle and their wives, and one A. G. Crawford, holding a mortgage upon the premises sought to be partitioned, were made parties defendant. The premises were owned in his lifetime by Zachariah Ogle, who died intestate, leaving a widow, Frances Ogle, and four children, to-wit: Alexander, Hiram and Malcolm Ogle and Nancy J. McMullin, and one grandchild, James

E. Fowler, the son of a deceased daughter, who died before her father. Alexander and Hiram Ogle purchased the interests of the other heirs, so that each owned an undivided half, subject to the dower and homestead of the widow. Complainant levied upon the undivided half owned by Alexander Ogle under a judgment against Alexander Ogle, and obtained a sheriff's deed thereto. The court below dismissed the bill, finding that the premises were Alexander Ogle's homestead, and that, as no proceedings were taken to set off the homestead, the execution sale was void, and complainant was not entitled to partition.

The present appeal is prosecuted from such decree of dismissal.

WILLIAMS & WILLIAMS, for appellant:

A homestead cannot exist in a remainder. There must be a present right of occupancy. *Murchison v. Plyler*, 87 N. C. 79.

Two tenants in common residing in separate buildings on the same premises may each be entitled to a homestead, but there cannot be two distinct homesteads acquired by the occupancy of the same dwelling. *Meguiar v. Burr*, 81 Ky. 32.

The interest to entitle one to a homestead must be a possessory interest. *Watson v. Saxer*, 102 Ill. 585; *Feldes v. Duncan*, 30 Ill. App. 469.

A homestead cannot be jointly held with another. *Cornish v. Frees*, 74 Wis. 490.

Both the widow and remainder-man cannot have a homestead in the same tract of land. *Merrifield v. Merrifield*, 82 Ky. 526.

A homestead estate can have no separate existence independently of the title on which it is dependent and is commensurate with the same, whether the homestead is in the owner of the fee, for life or for years. *Browning v. Harris*, 99 Ill. 556.



One having an undivided interest in a larger tract than is by statute allowed for a homestead, is not thereby entitled to claim as a homestead any more of a tract than the amount specified in the statute. *Ward v. Huhn*, 16 Minn. 159; *O'Brian v. Kreuz*, 36 id. 136.

When real estate is claimed as a homestead, it is immaterial whether the claimant has at other times used and claimed the same as a homestead. His rights depend on the facts existing at the time the levy is made. *Ingle v. Lea*, (Texas) 8 S. W. Rep. 325.

The statute requiring the homestead to be set off before the premises are sold under execution is simply directory. A non-compliance with it will not render the sale void, and in a suit in chancery the court, in the exercise of its equitable powers, may adjust the rights of the parties as the circumstances seem to require, and may compel a division of that portion of the premises in excess of the homestead, or a payment of the judgment. *Leupold v. Krause*, 95 Ill. 440; *Loomis v. Gerson*, 62 id. 11; *Stevens v. Hollingsworth*, 74 id. 202; 22 Am. & Eng. Ency. of Law, 578.

A. C. CRAWFORD, for appellees:

A parol partition of land among tenants in common, carried into effect by possession taken by each party of his share, is valid and binding as to the parties thereto and those claiming under them. *Gage v. Bissell*, 119 Ill. 298; *Shepherd v. Rinks*, 78 id. 188; *Nichols v. Pudfield*, 77 id. 253; *Manly v. Pattee*, 38 id. 129; *Tomlin v. Hilyard*, 43 id. 300.

A severance of possession among tenants in common may be inferred from far less proof than would be required to prove a sale to a stranger. *Tomlin v. Hilyard*, 43 Ill. 300.

Under the statute of the State of Illinois a homestead right is not a mere exemption given to the householder, but it is an estate in the land to the value of \$1000. *Eldridge v. Pierce*, 90 Ill. 474; *Browning v. Harris*, 99 id. 456; *Hartman v. Schultz*, 101 id. 456.

A debtor has an estate of homestead in the whole farm, regardless of quarter section lines or numbers of lots or tracts, to the extent of \$1000, and if not worth more than that sum the whole is exempt. *Darby v. Dickson*, 4 Ill. App. 90; *Hartman v. Schultz*, 101 Ill. 437; *Kitterlin v. Insurance Co.* 134 id. 647.

The estate of homestead embraces property to the extent in value of \$1000, and is not controlled by any specific degree of interest or character or title in the property. It is the land itself which constitutes the homestead, and not the right of occupancy. *Hartman v. Schultz*, 101 Ill. 451; *Eldridge v. Pierce*, 90 id. 474; *Browning v. Harris*, 99 id. 459; *Watson v. Saxer*, 102 id. 585.

Wherever a debtor has such an interest in land as can be sold under execution, and he occupies that land with his family as a home, it is exempt from levy and sale, under the laws of this State, since 1873. Rev. Stat. chap. 52, sec. 1; *Feldes v. Duncan*, 30 Ill. App. 475; *Browning v. Harris*, 99 Ill. 456; *Watson v. Saxer*, 102 id. 585; *Eldridge v. Pierce*, 90 id. 474.

A sale on execution of the fee in the homestead of a judgment debtor without observing the requirements of the statute in that behalf is void, so as to convey no title capable of being asserted in a court of law, and, since 1873, in equity. *Bullen v. Dawson*, 139 Ill. 663; *Stevens v. Hollingsworth*, 74 id. 202; *Hartwell v. McDonald*, 69 id. 293; *Conklin v. Foster*, 57 id. 104; *Barrett v. Wilson*, 102 id. 302; *Kerr v. South Park Comrs.* 8 Biss. 276.

A debtor may sell his homestead while temporarily elsewhere, and give a good title, and free from the lien of any judgment then existing. *Moore v. Flynn*, 135 Ill. 74.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The farm in question consisted of 160 acres. When Zachariah Ogle, who owned the fee simple title to it, died on December 14, 1888, he occupied the house upon it as a

residence. The house so occupied by him was upon the west half of the farm. Before and at his death, he was a householder and had a family, and was entitled to an estate of homestead to the extent in value of \$1000.00 in the farm and buildings thereon. His homestead, and all right and title therein, were exempt from attachment, judgment, etc., as provided in section 1 of the Exemption act. (2 Starr & Cur. Stat.—2d ed.—p. 1865).

Frances Ogle, the wife of Zachariah Ogle, survived him, and continued to live in the house upon the west half of the farm. "Such exemption" continued after the death of her husband for the benefit of herself, as long as she continued to occupy the homestead, and of her children, until the youngest child became twenty-one years of age, in accordance with the provisions of section 2 of the Homestead act. (2 Starr & Cur. Stat.—2d ed.—p. 1871). It appears that in October, 1891, all of her children, and her grandson, were of age. At that time Malcolm Ogle, her youngest son, and James E. Fowler, her grandson, conveyed their two-fifths interest in the farm to their older brothers, Alexander Ogle and Hiram Ogle. On May 29, 1893, her daughter, Nancy J. McMullin, conveyed her one-fifth interest to said Alexander and Hiram. At the latter date, Alexander Ogle and Hiram Ogle owned the whole farm, each an undivided one-half thereof, subject to a mortgage thereon, dated May 21, 1893, for \$950.00, drawing seven per cent interest, executed by them to one Crawford, and subject to the dower of the widow, Frances Ogle, and to her right of homestead.

On May 29, 1893, Mrs. McMullin, who had a husband and family, lived in her own home, and not with her mother. Hiram Ogle lived with his family in a house upon the east half of the farm. Whether this house was built before his father's death, or thereafter, does not appear; but he lived there in pursuance of an oral agreement for partition between himself and his brother, Alexander, by the terms of which he was to take the east half

and Alexander the west half of the farm. The right of Alexander to the west half was subject, however, to the right of occupancy thereof by his mother as long as she lived. Alexander Ogle in 1893, and for some years prior thereto, cultivated a farm in what is called the "Sny bottom," about eight miles from the home farm above referred to. This farm he did not own, but had leased it from the owner thereof. He lived upon it with his wife and children most of the time, although he also lived with his mother in the house upon the west half of the home farm a part of the time. Malcolm Ogle was a single man, and lived in the same house with his mother a portion of the time before her death, which occurred on April 10, 1894, but just when he lived there is not shown by the evidence; it is clear, however, that he did not live there while the premises were in the occupancy of one Frank Black, a tenant of the widow, Frances Ogle, as hereafter stated.

The appellant obtained a judgment against Alexander Ogle for \$116.00 before a justice of the peace on June 16, 1893, and, after execution returned *nulla bona*, a transcript was filed in the circuit court of Pike county on December 11, 1893, and an execution was issued and levied upon the undivided one-half interest of said Alexander Ogle in said farm. The premises so levied upon were sold by the sheriff on February 24, 1894, for \$145.45 under the execution aforesaid to appellant, and, not having been redeemed from such sale within the statutory period, were conveyed to appellant by sheriff's deed, dated May 27, 1895.

Appellant seeks partition, as being the owner of an undivided one-half of the premises in question by virtue of his sheriff's deed. Appellee, Alexander Ogle, claims that the sheriff's sale was void upon the alleged ground, that, when the transcript from the justice of the peace was filed in the circuit court, and when the levy and sale were made, he was occupying the premises as his homestead, and said premises were worth less than \$1000.00.

No steps were here taken to set off the homestead in the manner prescribed by the statute.

A sale on execution of the homestead of the judgment debtor without observing the requirements of the statute in that behalf is void so as to convey no title, capable of being asserted in a court of law. (*Bullen v. Dawson*, 139 Ill. 633, and cases there cited). Where the homestead premises are not worth more than \$1000.00, a judgment against the owner is no lien upon them, and, when the debtor sells them, the purchaser takes them to that extent free from all judgment liens. The debtor's homestead to the extent of \$1000.00 in value is exempt from levy and forced sale. (*Asher v. Mitchell*, 92 Ill. 480; *Leupold v. Krause*, 95 id. 440; *Halliday v. Hess*, 147 id. 588; *Bach v. May*, 163 id. 547).

The testimony is not altogether clear as to the value of the interest levied upon; Alexander and Hiram Ogle paid about \$900.00 for the three-fifths interest purchased by them in 1891 and 1893, that is to say, about \$300.00 for each one-fifth. No other proof of value appears in the record. At these figures, the value of the whole farm would not be over \$1500.00, and after deducting the mortgage of \$950.00 and interest, the undivided half levied upon would be worth only about \$500.00; and counsel for appellees estimates the value of the whole premises upon the basis of the amounts at which these purchases were made.

There is conflict in the authorities upon the question, whether there can be a homestead in an undivided interest in land, or, in other words, whether an estate in co-tenancy will support a right of homestead in one of the co-tenants, or whether homestead can only exist in an estate in severalty. (Thompson on Homestead and Ex. secs. 180-189; Waples on Homestead and Ex. pp. 134-138). We are inclined to the opinion, that an undivided interest, accompanied by exclusive possession, will support the homestead right. (*Herdman v. Cooper*, 29 Ill. App. 589; *Kaser v. Hass*, 27 Minn. 406; Freeman on Co-tenancy and Par. sec.

54; Thompson on Homestead and Ex. sec. 181). The objection, usually urged against allowing a homestead estate to attach to an undivided interest, is, that, in setting off the homestead, the rights of the co-tenants may be interfered with, and the particular part, set off as a homestead, might, on partition, fall to one of the other co-tenants. But this is a matter of which the other co-tenants alone can complain, and, if their rights are respected, persons who are not co-tenants, cannot object. The object is to protect the portion set off from judgment levies and sales, and not to give an assured title thereto. The co-tenant of the claimant of a homestead cannot question the latter's "right to acquire a homestead interest in the property, so long as such co-tenant is allowed to enjoy all his rights and privileges in and to said property as a co-tenant." (*Tarrant v. Swain*, 15 Kan. 149).

We do not, therefore, regard the fact, that Alexander Ogle's interest in the farm was an undivided one-half thereof, as militating against his claim to a homestead, if in other respects his right thereto is established. Especially is this so, in view of the arrangement with his brother, Hiram, the owner of the other undivided half, as to a partition, which was to give the west half to Alexander and the east half to Hiram. Of this, however, the judgment creditor had no notice.

Nor can it be doubted, that, if Alexander did have a homestead, the sheriff's sale of it was absolutely void, it being less in value than \$1000.00. The question, which it has been most difficult for us to decide, is the question whether his occupancy of the premises, if he occupied them, was of such a kind as to bring it within the requirements of the statute as to homesteads. It will be noticed, that the filing of the transcript, and the levy upon and sale of the property, all took place in the lifetime of his mother, the widow of Zachariah Ogle. The homestead exemption continued for her benefit after her husband's death. It is true, that her homestead was never assigned

to her by any formal proceeding, but she was permitted by the sons to reside in the house on the west half of the farm, and to receive the rents thereof from the time of her husband's death to the date of her own death. It was called her homestead and treated and regarded as such. Sometimes her son, Alexander, occupied the house with her, and called it his homestead. He had some furniture there which he never removed, but most of the time he lived with his family upon another farm distant eight miles, which he rented and cultivated. Mrs. Frances Ogle seems to have been in feeble health during the later years of her life, and spent some of her time visiting in Indiana, and some of her time with her daughter, Mrs. McMullin; but she never abandoned the premises. During the last six months of her life, she was at the house of Mrs. McMullin. On November 4, 1893, she leased the homestead premises to one Frank Black, who occupied them as her tenant until four or five days before her death on April 10, 1894. This lease was made for her by her daughter, Mrs. McMullin, and the rent paid by Black was paid for her use to Hiram Ogle, and not to Alexander. While Black occupied the premises, Alexander Ogle was living upon his farm in the "Sny bottom," and did not take possession of the homestead until Black left, and until a few days before his mother's death.

While Black was in possession as tenant, the transcript was filed, and the execution was issued and levied, and the sale was made. Surely, this was during the existence of the homestead right in Mrs. Ogle, and during the possession of the homestead by her. Whatever rights Alexander had in the homestead, even when he occupied it with his mother, were subordinate to her homestead rights. She was the householder. Her youngest son, Malcolm, may have lived with her up to the time of the lease to Black. But, whether he did or not, she was not deprived of her homestead by the fact, that her children were of age, and, except one, lived to themselves and had

families of their own. "A widow without children is as much entitled to retain the homestead of her husband as one with children, for she may occupy it herself, with servants, or alone, if she chooses. But if it is more convenient or profitable for her, what reason is there why she may not let it to another, for a term of years, until she may wish to return to it?" (*White v. Plummer*, 96 Ill. 394).

If the present case was one where the execution had been levied upon the homestead estate of Mrs. Ogle, a different question would be presented. In such case, the levy and sale would be void and of no effect. But the question here is, whether an adult son, having a wife and children of his own and engaged in cultivating a distant farm, can, by occasionally occupying the homestead of his mother, his father's surviving wife, or by leaving some of his furniture in his mother's homestead, claim her homestead as his own, or claim to have a joint homestead with her, so as to protect the interest, which he owns as heir of his father in the homestead property, from being subjected by his creditors to the payment of his own individual debts. This question must be answered in the negative.

"The estate of homestead in a widow in the lands, of which her husband died seized, is a conditional life estate, subject to the joint right of occupancy of the children of the deceased husband during the minority of the youngest thereof. The estate is upon condition, that it shall not be voluntarily surrendered or abandoned." (*Jones v. Gilbert*, 135 Ill. 27). It cannot be claimed, that the widow surrendered or abandoned the homestead, because she went to her daughter's house to be taken care of during her last sickness, and rented the homestead place during her absence, in order to get income enough from it to pay the expenses of her sickness. (*Walters v. People*, 18 Ill. 194; *Browning v. Harris*, 99 id. 456; *Hagerty v. Hagerty*, 149 id. 655).



Where the head of the family, having an estate in fee in the homestead premises, dies, the right of the homestead devolves upon the surviving wife by operation of law. A life estate is carved out of the fee for her estate of homestead. The heirs take a reversionary interest or remainder, expectant upon the termination of the estate for life and for years created by the statute. (*Browning v. Harris, supra*; *Jones v. Gilbert, supra*; *Kitterlin v. Milwaukee Mechanic's Ins. Co.* 134 Ill. 647; *Merritt v. Merritt*, 97 id. 243).

If there is no will, the homestead premises are vested in the heirs, subject to the particular estate or right of occupancy for life, which is given to the widow. The Partition act, which went into force in 1874 after the Homestead act which went into effect in 1873, expressly provides for the partition of premises, inherited by heirs, subject to dower and the estate of homestead. (*Merritt v. Merritt, supra*; 3 Starr & Cur. Stat.—2d ed.—p. 2921).

The interest of the heir may be levied upon and sold subject to the homestead right, especially when the homestead has not been assigned. We see no reason why the appellant, as a judgment creditor, could not levy upon and sell the interest of Alexander Ogle, subject to the homestead rights of Mrs. Ogle. In *Hartman v. Schultz*, 101 Ill. 437, it was held, that no sale can be rightfully made of the homestead by the administrator of the deceased householder to pay his debts, when the property does not exceed in value \$1000.00, until the exemption in favor of the widow and minor children has been in some mode terminated; and that the homestead, when not exceeding \$1000.00 in value, cannot even be sold subject to the homestead right. But it has never been held, that a judgment against one of the heirs cannot be enforced against his undivided interest, subject to an unassigned right of homestead in the widow. (Waples on Homestead and Ex. p. 652; *Hartes v. Seinsheimer*, 67 Tex. 356; Thompson on Homestead and Ex. sec. 573).

The widow, being the head of the household, owns the homestead estate during her life and until the youngest child becomes twenty-one years old. The word, "householder," means the head, or person, who has the charge of the family, and does not apply to the subordinate members or inmates of the household. (Thompson on Homestead and Ex. sec. 45; Waples on Homestead and Ex. p. 58). It was held in *Zander v. Scott*, 165 Ill. 51, that a householder may not necessarily be the head of a family; but in that case it appeared that the husband and wife lived together, and had children, and the wife owned the fee of the homestead property; and it was held, that she was a householder having a family, although not the head of the family. The ordinary signification, however, of a householder is, that such a person is the head of the family, upon whom the other members are dependent. The family, within the meaning of the Homestead law, consists of those members of the household, who are dependent upon the householder for support, or to whom the householder owes some duty. (*Holmback v. Wilson*, 159 Ill. 148). To constitute a homestead, there must be a householder and a family. There cannot be two householders. If Mrs. Ogle was here the head of the household, or the householder, her son, Alexander, could not also be the head of the family or the householder, even though he lived with his mother a part of the time. It certainly cannot be said, that, having a family of his own, whom he supported by operating a distant and independent farm, he occupied any relation of dependence, so far as his mother was concerned.

If Alexander Ogle had a homestead in these premises, then as his mother also had a homestead, each would be entitled to have a homestead set off. But two separate homesteads, thus laid off and described, cannot exist in the same land at one and the same time. (*Murchison v. Plyler*, 87 N. C. 79). Moreover, homestead involves a present right of occupancy. As Mrs. Ogle was life tenant,

she was entitled to the present right of occupancy, but as Alexander Ogle was only a remainder-man or reversioner, his right of occupancy could not attach until the expiration of the life estate. The provisions of law in reference to a homestead do not apply to a remainder dependent upon a life estate. (*Murchison v. Plyler, supra*). Both the widow and the remainder-man cannot have a homestead in the same tract of land. (*Merrifield v. Merrifield*, 82 Ky. 526). Nor can a homestead be occupied jointly with another person, so as that both shall have estates of homestead within the meaning of the statute. (*Cornish v. Frees*, 74 Wis. 490; *Kyle v. Wills*, 166 Ill. 501).

Freeman, in his work on Executions, says: "The homestead right, if any exists, is in the holder of the estate in possession. Hence, a reversioner or remainder-man, because his estate is incompatible with the existence of a homestead in fact, cannot secure its exemption from forced sale by claiming it as a homestead." (1 Freeman on Executions,—2d ed.—sec. 242). Waples, in his work on Homestead and Exemption, says: "Upon the death of the father, the mother succeeds to the headship of the family." (Waples on Homestead and Ex. p. 644).

In *Cornish v. Frees, supra*, a father entered into possession of certain premises, and, dying, devised them to his widow for life, and on her death to his two sons. One of the sons, being an adult and having a wife, lived with his wife upon the premises, and his mother, his father's widow, also lived thereon; and it was held, that the son did not have a homestead in the premises, but was in possession under and with his mother; and that he and his wife did not "own and occupy" the premises in the sense of the Homestead law, but held possession under the widow, who remained in possession after her husband's death and had a life estate under his will; it was there said: "A homestead cannot be jointly held with another."

In *Kyle v. Wills, supra*, we have recently held, that the estate of homestead devolves upon the widow, by opera-

tion of law, *eo instanti* upon the death of her husband, and continues for the benefit of the widow and children until the youngest becomes twenty-one years of age; but that this benefit does not extend to married children, having families and homes of their own. So, here, Alexander Ogle had no homestead in the premises occupied by his mother, which entitled his interest to exemption from execution sale.

We are not prepared to say, that the consideration, for which the interest of Alexander Ogle was purchased by the appellant, was grossly inadequate. At the time of the levy and sale, it was not worth, with the mortgage upon it, more than about \$500.00 according to the contention of the appellees. In addition to this, it was at that time, subject to the widow's dower and homestead. It is true, that inadequacy of consideration will sometimes justify a court of equity in setting aside a judicial sale, when such inadequacy is coupled with circumstances of irregularity or fraud. (*Parker v. Shannon*, 137 Ill. 376; *Bach v. May*, 163 id. 547; *Bullen v. Dawson*, 139 id. 633). But, in the case at bar, there were no circumstances of irregularity or fraud attending the sale, even if the consideration therefor was inadequate. The sheriff's deed was not, therefore, invalid. Moreover, appellee, Alexander Ogle, filed no cross-bill, setting up any equities, or asking that the sale be set aside. The case, as presented by the record, is an ordinary bill for partition; and the answer merely sets up, that the complainant's title under the sheriff's deed was void, because the defendant is claimed to have had a homestead in the premises, which was not set off to him. This claim cannot be sustained under the facts of this case.

The decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

*Reversed and remanded.*

Mr. CHIEF JUSTICE PHILLIPS, dissenting:

To the extent this opinion holds that the interest of a tenant in common will support a right of homestead in one of the co-tenants in the premises I cannot concur. On this question the authorities are conflicting. It has been held that an estate in common will support a right of homestead in one of the co-tenants in Vermont, Iowa, Texas, Kansas, New Hampshire and Arkansas. Whilst the statutes of those States are not the same, the general principle on which they sustain the right of homestead in a co-tenant is, that whilst such right cannot be enforced hostile to a co-tenant or one holding under him, yet third persons, nor a co-tenant, cannot question his right to acquire a homestead interest in the property, so long as his co-tenant is allowed to enjoy all his rights and privileges in such property, and no third person should be permitted to avail himself of the law of co-tenancy for his own gain. That an estate in common will not support a right of homestead in a co-tenant has been held in Massachusetts, California, Minnesota, Wisconsin, Louisiana and Michigan. The reasons given for the latter view are usually the impracticability of assigning such interest, and absence of statutory power in the court to do so.

The first section of the Exemption act provides the householder is entitled to the farm or lot, etc., owned or possessed and occupied as a residence. Whatever interest is so owned or possessed, in order to constitute the homestead it must be of some specific portion capable of being set apart by metes and bounds, that it may be separated from that which is not exempt. The statute provides that the homestead may be set off in the method there directed, but it would be impossible to apply any of the methods declared by the statute to an estate in common. The tenant in common owns nothing in severalty, and no part could be set off to him which did not belong equally to his co-tenants. If the legislature intended to include tenants in common as being entitled to a homestead in lands

so held, they would have provided a method of setting off the same. By the first section of the act the "homestead, and all right and title therein, shall be exempt from attachment, judgment, levy or execution sale for the payment of his debts, or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided." While thus fixing certain qualities and rights attaching to homesteads, the statute is silent as to the homestead right attaching to lands held in common by two or more tenants. Being silent in this respect, those States which hold that an estate in common will support a right of homestead in one of the co-tenants must necessarily add to the statute and take from it. It cannot be free from the laws of conveyance, for if it cannot be partitioned the co-tenant may have it sold. That would be a violation of the spirit and words of the act, and would take away one of the rights and qualities of a homestead. If it should be sought to set off the co-tenant's interest in the manner prescribed by the statute, the homestead so set off might be at once defeated by the co-tenant having partition made, or sold if it could not be divided. It renders necessary the addition of words to the statute which gives a homestead in the farm or lot owned or possessed and occupied as a residence. If a farm or lot is owned by the householder, no one else has an interest therein. If it is not, then the homestead cannot attach. The legislature has made no provision for a case of this character, and it is not our province to do so. If hardships arise, they may be remedied by legislation which shall meet all the exigencies of such cases. The best interpretation which can be given this statute is to limit it to cases of sole ownership or possession.

In the case of *Tomlin v. Hilyard*, 43 Ill. 300, a similar question was before this court and the case was decided sustaining the right of homestead, because there had been a parol partition followed by a several possession. The reasoning in that case sustains what I have here written.

JOSEPH G. ENGLISH

v.

THE CITY OF DANVILLE.

*Opinion filed November 8, 1897.*

1. MUNICIPAL CORPORATIONS—city's discretion in improving streets is not controlled by the courts, in absence of abuse. The discretion of a municipal corporation in laying out, opening, widening, altering, extending, paving or grading its streets will not be controlled by the courts, in the absence of abuse.

2. SAME—when city is not liable in damages to an abutting owner. A city is not liable in damages to an abutting owner merely because, on paving a street in front of his property, a space is left for sward, in addition to the space for sidewalk, upon the side of the street across from his property, while only a space for sidewalk is left in front of the property in question.

*English v. City of Danville*, 69 Ill. App. 288, affirmed.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on writ of error to the Circuit Court of Vermilion county; the Hon. FERDINAND BOOKWALTER, Judge, presiding.

This was an action on the case by Joseph G. English, plaintiff in error, brought in the Vermilion circuit court, against the city of Danville, defendant in error. The amended declaration alleges that he is, and for more than twenty years has been, the owner and occupant of a certain lot in the city of Danville having a frontage on the east side of Gilbert street of two hundred feet; that Gilbert street runs north and south the entire length of the city, and is one of its principal residence streets, and is forty-nine and one-half feet, or three rods, wide for a distance of three blocks, including the block on which plaintiff's lot is situated; that by the general ordinances of the city it is provided that sidewalks on three-rod streets should be nine and three-fourths feet wide; that by ordinance of May 23, 1895, it was ordered that Gilbert street, for these three blocks, should be improved by setting curb-

ing on each side of the same, at an average distance of fifteen feet from the center line of the street; that along the west side for these three blocks the city, contrary to the provisions of the aforesaid ordinances, and unnecessarily, arbitrarily, unjustly and wrongfully, put, and suffered to be put by the lot owners along said west side, permanent stone curbing twelve feet from the center line of the street, whereby those lot owners are permitted to enjoy a space of twelve and one-half feet, viz., five feet for sidewalk and seven and one-half feet for sward, shade trees, parks, statuary and ornaments, thereby beautifying, ornamenting and enhancing in value these lots, while on the east side for these three blocks the city, on November 19, 1895, contrary to the ordinances, and unnecessarily, arbitrarily, unjustly, inequitably and wrongfully, put permanent stone curbing nineteen feet east of the center line of the street, leaving only five and three-fourths feet for a sidewalk and allowing no space on that side for sward, etc., as was allowed on the other side, and thereby greatly depreciated the market value of the lots on the east side, including plaintiff's lot; that there was no public demand or necessity for travel or convenience requiring the curbing to be so placed as aforesaid, but that it was done unnecessarily, etc., and through favoritism; that thereby plaintiff's lot is injured and greatly depreciated in value generally, and especially in this: that its Gilbert street front is not as handsome and inviting in general appearance; that it does not have an equal degree of safety with a lot having a wider sidewalk in its front; that it does not have an equal opportunity with the west side lots for sward, etc.; that it is more subject to annoyance from dust, danger and noise necessarily caused by the public travel and traffic in its front; that it is made less inviting and desirable to purchasers seeking lots for residences, and that it is otherwise injured and depreciated in its market value by the acts aforesaid; lays damages at \$1200.



The defendant demurred generally and specially to the declaration, one of the special reasons being, that it alleged no abuse of discretion vested by law in the city as to the manner of making public improvements, nor any fraudulent or wrongful intent, nor any facts from which any abuse of discretion or fraudulent intent must necessarily follow. The court sustained the demurrer, and the plaintiff brought error in the Appellate Court for the Third District, which court affirmed the judgment, and he has further prosecuted this writ of error in this court.

D. D. EVANS, for plaintiff in error.

G. F. REARICK, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

A municipal corporation has full power to lay out, establish, open, alter, widen, extend, grade and pave, or otherwise improve, streets and sidewalks therein, and its discretion in so doing will not be controlled by the courts, unless it manifestly abuses such discretion. It is clear that the declaration in this case does not set forth sufficient facts to give rise to the conclusion that the city of Danville abused the discretion vested in it, in the improvement of Gilbert street. While the roadway of the street was located nearer to the lot lines on the side on which the plaintiff's property was situated than on the other side, still, sufficient space, so far as the declaration shows, was left for a sidewalk, and the mere fact that an additional space of seven and one-half feet was left next adjoining a similar space on the other side of the street, for sward, the planting of trees and other ornamentation, would not, under the mere allegation that it was done wrongfully, unnecessarily and through favoritism, sufficiently show that the city had abused its discretion in improving the street. It is apparent that had no space been left on the west side of the street for the ornamen-

tation before mentioned, and only five and three-fourths feet left for a sidewalk, as on the east side, the plaintiff would not have had, upon the terms of his own declaration, any ground of complaint, although it would have left the space for sidewalks on each side of the street less than that provided by the ordinances, which space, as alleged, was required by the ordinances to be nine feet, for, so long as a sufficient space was left for a sidewalk, the abutting property owner would have no right of action simply because such space was not as wide as the ordinances provided it should be.

The case as made by the declaration is a very different one from *Carter v. City of Chicago*, 57 Ill. 283. In that case the city was enjoined from so changing its roadway as to leave no space whatever for a sidewalk on the west side of the street, while a space of fourteen feet was left on the other side, where it appeared that the purpose of the city and its officers was to compel the property owners upon the west side of the street to relinquish for the purposes of a sidewalk a certain space twelve feet in width in front of their lots, which had been dedicated or reserved for the express purpose of court-yards in front of their property. The bill showed a gross abuse of power on the part of the city, and a purpose, by the exercise of such power, to oppress the owners of property having the benefit of such court-yards. In the case at bar the city has not attempted to deprive the abutting property owners of a sidewalk, nor of a sufficient space in front of their property upon which to construct a sidewalk, and much less does it appear that the discretion of the city was exercised for any such oppressive and unlawful purpose as was disclosed by the bill in the case mentioned.

As the allegations of the declaration must be construed most strongly against the pleader, it may well be that the property owners owning property abutting on the west side of said Gilbert street had, in advance of the improvement of the street by the city, and at their own

expense, built sidewalks and improved the said space adjoining it as a sward, and ornamented and otherwise improved it by the planting of trees, and that the roadway of the street was located as it was by the city to avoid the destruction of such improvements. Such a state of things is entirely consistent with the allegations of the declaration. Or the city, so far as anything appears to the contrary, may have had other sufficient grounds for its action which would make it apparent that no oppressive, unlawful or malicious use was made of the discretion vested in it by law. It devolved on the plaintiff in error to allege such facts and circumstances as would show an abuse of discretion on the part of the defendant, and that his property was damaged thereby. In that he failed, and the demurrer was properly sustained.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

Mr. JUSTICE BOGGS, having passed upon this case in the Appellate Court in and for the Third District, took no part in this decision.

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ELLEN DUFFY KING

v.

INTERNATIONAL BUILDING, LOAN & INVESTMENT UNION.

*Opinion filed November 1, 1897—Rehearing denied December 14, 1897.*

1. LOAN ASSOCIATIONS—*payments on stock must continue until full value is given.* By the provisions of the act of 1879 on homestead loan associations (Laws of 1879, p. 83,) subscriptions to stock must be paid in periodical installments, until the amount paid in, together with the earnings, equals the full face value of the shares.

2. SAME—*contract that stock will mature when part of subscription is paid is illegal.* A contract between a loan association organized under the act of 1879, and its subscribers, that the payment of periodical installments for a fixed period shall be accepted by the

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|-----|-----|
| 170 | 135 |
| 78a | 133 |
| 170 | 13  |
| 87a | 63  |
| 88a | 24  |
| 170 | 13  |
| 187 | 27  |
| 170 | 1   |
| 215 | 4   |
| 215 | 4   |

association as full payment of the subscription, is inconsistent with the statute and antagonistic to the purpose of the association, and is not enforceable as a contract.

3. SAME—*fact that by-law authorizes illegal contract does not make it binding.* A by-law of a loan association which authorizes contracts that stock should mature at a fixed period upon part payment of the subscription, does not make the contract binding where the by-law is inconsistent with the statute.

4. SAME—*illegality of contract to mature stock before full payment does not affect holder's ownership of stock.* The invalidity of an agreement between a loan association and a subscriber as to the maturity of his stock upon part payment of the subscription does not affect the subscriber's ownership of the shares of stock called for in his certificate, but such stock must be treated as of the kind which the association might lawfully issue under the statute.

5. SAME—*holder of stock to mature before full payment, occupies same position as other stockholders.* The holder of stock which, by illegal agreement, was to have matured before full payment of the subscriptions, occupies the position of a mere stockholder, having the same rights as, but no privileges over, fellow-stockholders.

6. SAME—*stockholder cannot recover dues without withdrawal or retirement of stock.* A stockholder in a loan association cannot recover dues paid in upon his stock without having first withdrawn or retired his stock in accordance with the provisions of the statute and such by-laws as are in conformity therewith.

*International Building Union v. King*, 68 Ill. App. 640, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

The action was assumpsit, brought by the appellant, against the appellee, the International Building, Loan and Investment Union, in the Superior Court of Cook county. The declaration contained (1) a common count for goods, wares and merchandise alleged to have been sold and delivered by the plaintiff to the defendant union, at its request; (2) a second common count, which was the consolidated money counts; (3) a third common count, alleging indebtedness found due and owing plaintiff upon an accounting had with the defendant of and concerning

divers sums of money before that time due and owing from defendant to plaintiff; and also a (4) special count.

The special count alleged the plaintiff applied for twenty shares of stock in the defendant union, and was granted a certificate of the union constituting her a shareholder of that number of shares of stock, and agreeing that the union would pay plaintiff the sum of \$100 for each of said shares of stock at the end of six years, provided the said plaintiff should pay the sum of seventy-five cents each month upon each of said twenty shares of stock for the said period of six years, and a fee of five per cent upon the par value of said shares at the time of the maturity of the contract; that the said period of six years has elapsed, and the plaintiff surrendered ten of said shares and made all payments required of her to be made to the union on the remaining ten shares, and complied with all the terms and conditions of the certificate, whereby the defendant union became and was indebted to her in the sum of the par value of the said ten shares, and in consideration of the said indebtedness undertook and promised to pay the same to her on demand, but, though often demanded, failed and refused so to do, wherefore, etc.

On the 11th day of July, 1896, said Superior Court caused to be entered of record a judgment in the sum of \$971.50 against the union, by default. The said union entered its motion to set aside the default and judgment, and in support thereof submitted divers affidavits, together with documentary evidence, and in opposition thereto the appellant presented an affidavit. The court overruled the motion, and the appellee union prosecuted an appeal to the Appellate Court for the First District to reverse the judgment and the order of the court refusing to allow the motion to set aside the default. The Appellate Court reversed the judgment of the Superior Court, refused to remand the cause, and caused to be entered in its judgment the following as a finding of fact in the

case, viz.: "The court finds that the certificate upon which the plaintiff below recovered judgment was issued without lawful authority, and is not binding upon the defendant union." This is an appeal prosecuted to reverse the judgment of the Appellate Court.

GEORGE W. BROWN, for appellant:

The certificate of stock was a solemn agreement on the part of appellee to pay appellant the amount of her shares in six years from the date of issuance. This promise was not modified, restricted or overridden by anything in the by-laws. This agreement is in all respects *infra vires* and legal, and is binding on appellee. Even if such agreement is *ultra vires*, it was not immoral, contrary to public policy, or prohibited by statute. Consequently, it is not void, and appellee is estopped to set up that it was *ultra vires*. *Kadish v. Building Ass.* 151 Ill. 531; *Benefit Ass. v. Blue*, 120 id. 151; *Bradley v. Ballard*, 55 id. 415; *Darst v. Gale*, 83 id. 136.

The agreement to pay stock in six years from date of issuance was part of the fundamental plan of the association. All stock was subscribed on this basis. Hence, the association and its shareholders are estopped to set up the illegality, even if the agreement was in fact illegal. *Insurance Co. v. Frear Stone Manf. Co.* 97 Ill. 537; *Insurance Co. v. Osgood*, 93 id. 69; *American Tube Works v. Machine Co.* 139 Mass. 5; *Higgins v. Lansingh*, 154 Ill. 301; *Kent v. Mining Co.* 78 N. Y. 159; *Scoville v. Thayer*, 105 U. S. 143; Cook on Stockholders, (3d ed.) secs. 551, 267, 268; *Lockhart v. VanAlstine*, 31 Mich. 76; 5 Thompson on Corporations, sec. 6032; *Willoughby v. Railroad Co.* 50 N. J. Eq. 656; *Thresher Manf. Co. v. Langdon*, 44 Minn. 37.

Even if the agreement to pay the stock in six years is absolutely void, and appellee is not estopped to set up the illegality, appellant is entitled to recover, under the common counts, the monthly installments paid by her under the contract, with interest. 5 Thompson on Corpo-

rations, secs. 5984, 6007; *McCormick v. Bank*, 162 Ill. 100; *Day v. Buggy Co.* 57 Mich. 146; *Railroad Co. v. Railroad Co.* 131 U. S. 371; *Louisiana v. Wood*, 102 id. 294; *Paul v. Keno-sha*, 22 Wis. 266; *Anthony v. Sewing Machine Co.* 16 R. I. 571.

ALLAN C. STORY, and STORY, REDFIELD & RUSSELL,  
for appellee:

Corporations possess such powers, and such only, as are conferred upon them by the law of their creation, and those who deal with them are chargeable with notice of their powers and the limitations of their capacity, and cannot plead ignorance of the public laws and the constitution. Every person is bound, in dealing with a corporation to take notice of the extent of its power. *Pearce v. Railroad Co.* 21 How. 441; *McGregor v. Railway Co.* 16 Eng. L. & Eq. 180; *Steamship Co. v. Dock Co.* 28 La. Ann. 173; *Franklin County v. Institution for Savings*, 68 Me. 43; *Davis v. Railroad Co.* 131 Mass. 258; *Bank v. Globe Works*, 101 id. 57; *Water Co. v. Dekay*, 36 N. J. Eq. 548; *Durkee v. People*, 53 Ill. App. 396.

Mr. JUSTICE BOGGS delivered the opinion of the court:

It appears from the statement of facts set out in the brief of the appellant that the only cause of action is that set out in the special count of the declaration. The argument for appellant proceeds upon the same theory, and relies upon the common counts only in connection with the demand set forth in the special count. The case is presented by the appellant upon the theory the only proofs introduced in the Superior Court in making an assessment of damages under the default were such as related to the allegations of the special count. The only question referred to in the brief of counsel in this court is, whether a good cause of action was set up in the special count of the declaration. We may therefore confine our attention to the single question presented by the brief.

The appellee union is a corporation organized under the provisions of an act of the General Assembly entitled "An act to enable associations of persons to become a body corporate to raise funds to be loaned among the members of such association," in force July 1, 1879. The provisions of the act do not authorize corporations formed under it to enter into agreements with those who may become subscribers to its capital stock, that the shares issued to such subscriber shall mature at a fixed period, but require that subscriptions shall be made payable in periodical installments, (not exceeding two dollars on each share,) which periodical payments shall be made by the subscriber until such payments, together with the earnings of the union, shall equal the full face value of the shares. (Hurd's Stat. 1897, chap. 32, sec. 83.) All contracts and agreements of such corporations to the effect that the payment of periodical installments for a fixed period shall be accepted as payment in full of subscriptions to its stock are inconsistent with the statute under which the corporation has its existence, and antagonistic to the legal purposes and plans of such organization, and not enforceable as contracts merely. (2 Morawetz on Private Corp. secs. 682, 683; 1 Thompson's Com. on Law of Corp. 1011.) Whether the infirmity in such contracts may be removed by subsequent ratification or long acquiescence of all the other holders of stock need not be here considered, for there is no averment of that character in the declaration, and the sole question before us is, whether the averments of the declaration are sufficient to show a cause of action.

It is urged the by-laws adopted by the appellee union authorized the agreement that the stock should be matured in the period of six years by the payment of the sum of seventy-five cents per month on each share during that time. If this were true, the by-laws would be ineffectual to make the agreement valid, for the reason a corporation has no power to enact a by-law inconsistent



with the statute under which it was created. The agreement would operate to give the appellant an unjust preference unless entered into with all other stockholders, and if entered into with all stockholders the obligation would be mutually binding upon all holders of stock. If the business of the corporation had not been sufficiently profitable to enable it to carry out the terms of the agreement, a question would be presented whether the agreements should be abandoned as to all or enforced as against all. Corporations of this character are mutual in character. Indeed, the obligations of the shareholders are akin to those of partners in a co-partnership. The plan of issuing stock containing such agreements is entirely foreign to the purposes of the corporation contemplated by the statute under which the one at bar was organized, and we cannot but regard them as of no force and effect, and it seems no injustice will befall any stockholder because of the invalidity of such an agreement.

If the amounts paid into the treasury of the union by way of installments and the earnings of the union equal the face value of the shares of stock, the shareholder would be in nowise benefited by an enforcement of the agreement. If, however, the amounts received from installments, together with the earnings, do not equal the face value of the stock, no shareholder could justly demand his fellow-shareholder should make up the deficiency to him without the same obligation should rest upon him to contribute to make good the deficiency as to each other share of stock, in which event he would lose as much as he would gain by an enforcement of the agreement.

It is proper, if not necessary, in view of the finding of fact made by the Appellate Court, we should remark the certificate of stock held by the appellant constitutes her the lawful owner of the shares of stock therein mentioned. The union is a creature of the statute, and as such had full authority to receive her subscription to its capi-

tal stock. Such subscription, however, must be deemed to have been received by it and made by her in view of the statutory provisions authorizing the stock to be issued. The statute authorized subscriptions to be received payable in periodical installments of dues, but expressly declared that "the payment of such dues shall continue on each share until the same shall have reached maturity value, or is withdrawn or retired." (Hurd's Stat. 1897, chap. 32, sec. 83.) This provision entered into appellant's contract of subscription and became a part of such contract. Indeed, in legal contemplation the provision is incorporated into her certificate as fully as if set forth therein at length in writing. This the appellant knew or must be deemed to have known. It controlled as against the illegal agreement that the stock should be matured at a period fixed arbitrarily, and without regard to the statutory requirement that stock should only mature when it reached par value. That illegal agreement being inoperative, the lawful contract remained in full force, and the appellant became and was the holder and owner of the shares of stock for which she subscribed. Her position now is that of a stockholder in the union, and as such she is entitled to all the rights and privileges which, under the statute and the by-laws of the union made in pursuance of the statute, appertain to a holder of shares in its capital stock, but not to any privilege not also secured by the statute to her fellow-shareholders. It follows she is not entitled to demand re-payment of dues paid by her to the union, except upon withdrawal or retirement of her stock in accordance with the provisions of the statute, and such by-laws as the union may have adopted in conformity with the statute.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

ELIZABETH CLARKE *et al.*

*v.*

ELBERT W. SHIRK *et al.*

*Opinion filed November 8, 1897.*

1. EVIDENCE—*construction of contract is not a matter for proof by witnesses.* An experienced builder and contractor may testify as to the accepted meaning among builders of technical words used in a contract for erecting a building, but it is not permissible to prove by such witness the proper construction of the entire contract.

2. CONTRACTS—*when provision of building contract is not complied with.* A provision in a contract for the erection of a building by a lessee, that the plans and specifications should be submitted to the lessor for approval before beginning the work, is not complied with by submitting a pencil sketch, without specifications.

3. SAME—*when party is not in default for not making payment under building contract.* Where a lessee who is erecting a building for the lessor materially changes the plan of the building without the lessor's knowledge or consent, the latter is not in default for refusing to make payment until the unauthorized change is rectified.

APPEAL from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

This was a bill in chancery, filed in the circuit court of Cook county by Elizabeth Clarke and others, as heirs-at-law of Dr. Franklin D. Clarke, deceased, the appellants, against Elbert W. Shirk and others, the appellees, praying for the delivery up and cancellation of a certain lease, re-conveyance of the premises, and other relief.

The facts leading up to the filing of this bill, as set out in the pleadings and shown by the evidence, are as follows: Dr. Clarke, in his lifetime, was the owner of certain property in Chicago known as No. 333 Michigan avenue, and on May 28, 1891, entered into an agreement with appellee Shirk for the sale of this property to Shirk, Clarke to furnish him, as soon as possible, an abstract of title showing a good and merchantable title, clear of all incumbrances, and on approval of the same by Shirk's counsel, Clarke to deliver a sufficient warranty deed for

the same on payment of \$40,000, which sum was stipulated to be "in full payment of said property." The abstract was delivered June 3 and approved June 5, but the sale was not consummated until July 19, 1891, on account of delay experienced in getting some mortgages on the property released. The agreement further provided that Shirk should make, and Clarke accept, a ninety-nine year lease of the property, at an annual rental of \$6000, payable in gold, semi-annually in advance, this ground rent to begin June 1, 1891, and the lease and deed to be delivered at the same time. The agreement further specified that the lease should provide for the erection by Clarke of a thoroughly fire-proof apartment or flat-building, to cover the entire frontage of the lot, (fifty feet,) and to be not less than eighty-five feet (subsequently changed to ninety-five feet) in depth, and not less than eight (subsequently changed to ten) stories in height, to be constructed of "steel, brick, terra cotta and granite," the plans and specifications to be examined and approved by Shirk before the construction of the building should be commenced; that if, within the time limited in the lease, (which should be before January 1, 1892,) five stories of this building should be erected and completed as far as possible without the roof being on, all the material and labor used and employed up to that time being fully paid for, so that the building would be free from all claims and liens, then Shirk would pay Clarke, "in further consideration for the conveyance aforesaid," the sum of \$15,000 in cash; and further payments were provided for as the building progressed, on the same conditions, until its completion, aggregating in all \$60,000,—all these payments to be made on the certificates of the architect that the terms of the lease had been complied with, the architect to be agreed upon by both parties. The agreement further recited that "the principal cause moving said party of the first part [Shirk] to purchase the aforesaid land is the execution of the aforesaid lease, and the expectation that the building

therein specified will be fully erected and completed in conformity with the terms and conditions of said lease, so that the same will be a substantial and adequate security for the payment of the rent therein specified, and the performance of the other conditions in said lease contained, on the part of said lessee; and it is expressly understood and agreed that the said sum of \$40,000 \* \* \* is and shall be in full payment and satisfaction of the whole purchase price of said land," and that the additional payments, amounting to \$60,000, "are to be taken and considered as additional consideration for the said land because of the erection and construction of the said building in accordance with the terms and provisions of said lease, and for no other reason, and that unless said party of the second part [Clarke] shall become entitled to the payment of the said sums, respectively, as aforesaid, the said party of the first part shall be under no obligation of any kind to make any further or other payment or consideration for the said land, except the said sum of \$40,000."

The lease was executed substantially as agreed upon, and contained covenants requiring Clarke to pay all taxes and assessments, to repair or re-build in case of fire, so that the building, when repaired or re-built, should be worth in cash not less than \$125,000, and that on default in the payment of rent for sixty days, or on the violation of any of its covenants or agreements, a notice of intention to forfeit the lease should be served on the lessee, and that fifteen days after the service of such notice such forfeiture might be declared in writing, and should operate as a complete and irredeemable forfeiture to Shirk of the entire interest of Clarke in and to the demised premises, and the buildings and improvements thereon, as damages agreed upon and liquidated; that at the expiration of the ninety-nine years the party of the first part should purchase the improvements then situated upon the premises at one-half their fair cash value, etc.

In the latter part of July, 1891, William G. Barfield, who was the architect mutually agreed upon, submitted to Shirk a pencil sketch of the building to be erected, which Shirk approved. This sketch provided for what is known as steel construction, the walls to be of steel columns; but on learning that the building ordinances of the city of Chicago would not permit the party walls to be so constructed, but required them to be of solid masonry, the architect and Clarke changed not only the outside walls, but also inside walls, to solid masonry, without apprising Shirk of this fact, who remained ignorant of the change till in December, 1891, when he was passing the property and noticed it.

Dr. Clarke died October 20, 1891, and the estate undertook to carry out the contract. No specifications were submitted to Shirk for approval until November, 1891, although he had written the architect for them a number of times before, stating in his letters that they might not be satisfactory to him, in which case changes would be necessary and additional expense entailed. On October 20, 1891, Barfield wrote to Shirk, saying that he had been unable to do anything or go forward in any way because the doctor had not secured the amount necessary to carry the building to the fifth story. In November Barfield sent some specifications to Shirk, but Shirk claimed that the only specifications sent were those of the mason work. Later, Shirk returned to Chicago and had several conferences with the architect. The only objection that he made and insisted on was to the solid inside walls, he insisting on having them of steel construction, his objection being that solid brick walls took up too much room. Work was stopped in January, 1892, after the foundations had been put in, on account of the failure of the Clarke estate to pay for the work done, as is alleged by appellees; as alleged by appellants, because Shirk refused to tell what kind of a building he wanted put up. Negotiations between the parties were in progress during the

next few months to come to some understanding or agreement by which the building could be put up, Shirk agreeing to an extension of the time, he having previously already agreed to an extension to July 1, 1892. Several attempts were also made to get other parties interested in the lease, but they all came to nothing. The work done on the building and the material furnished amounted to about \$42,000, for which the contractors got judgment in the probate court against the estate of Dr. Clarke.

The bill alleges that the complainants have been willing and able to carry out the contract, but have been hindered and thwarted in their endeavor to do so by the fraudulent and wrongful acts and conduct of Shirk. Shirk filed a cross-bill, setting up a declaration of forfeiture, and praying for a forfeiture as provided in the lease. The bill was subsequently amended, issues made up and a trial had before the court, and a decree entered finding the equities with the appellees and dismissing the bill for want of equity, and dismissing, also, the cross-bill, without prejudice to appellees' remedy at law. From this decree appellants have appealed to this court.

JOHN M. GARTSIDE, FRANK P. LEFFINGWELL, and JOHN W. WALSH, for appellants.

ULLMANN & HACKER, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

The questions for determination in this case are principally questions of fact. The cause was heard in the court below mainly upon testimony given orally before the chancellor, and the decree ought not to be disturbed unless it appears that a wrong conclusion was reached.

We cannot agree with appellants in their contention that the evidence shows that the appellee Shirk failed or refused to comply with the contract on his part, thereby entitling appellants to have the same rescinded. On the contrary, we think the record shows that the appellants

themselves failed to comply with and carry out the provisions of the contract and lease which Dr. Clarke had undertaken to perform. By the terms of the contract the plans and specifications were to be approved by Shirk, but, after he had approved a pencil sketch of the plans submitted to him by the architect, the work was commenced before the specifications were presented to him and before he had any opportunity to approve them, and work was entirely suspended in January, 1892, before enough was done to call for the first payment from Shirk, under the contract, and has never since been resumed. This bill was filed in September, 1892. Appellants, as Clarke's representatives, undertook to carry out the contract after his death, but failed to do so, and we do not think the evidence shows that such failure was brought about by the fault of Shirk. The evidence shows that just before the work was suspended on the building the architect wrote to the different contractors, directing them to suspend work until Mrs. Clarke should pay a certificate which he had issued to the contractor for the masonry, showing that he was entitled to a payment of about \$10,000. True, this contractor testified that he did not stop work because this certificate was not paid, but because other contractors refused to go on, and because he could not proceed with his work independently of others. He testified, also, that he was advised by his attorney to go on with the work. The others stopped because they were ordered to do so by the architect. The appellants claim that they were willing and able to pay for the materials furnished and work done, but did not want to pay unless Shirk would signify his approval of the plans and specifications, or tell what he did want. They never did, however, pay for any of the work.

There is no showing in the record of the assets of the Clarke estate. The \$40,000 Clarke received for the land was nearly all consumed in paying off the mortgages, brokerage fees, etc. Mrs. Clarke stated to the witness



Tharp that she could not go on and complete the building; that a sale of horses at the stock yards did not turn out nearly as much as she anticipated and that a stock of jewelry did not bring as much as she thought it would. The claims on account of this building allowed in the probate court amounted to \$42,000, and not much more than the foundation and basement was completed. Nothing was ever paid on these bills, either by Dr. Clarke or the estate. The efforts made to get other parties interested in the lease show that the estate did not feel able to carry on the enterprise alone. Shirk declared his willingness to extend the time for finishing the building, but wanted it built according to contract, in a way that he could approve, and wanted to be certain of the financial ability and responsibility of the party that would undertake to fulfill the contract. There seems to have been but one person who was ever seriously put forward as such a party,—one Ingram, now living in Texas, but whom Shirk did not consider financially responsible, and whose statements, as preserved in the record, are, to say the least, rather inconsistent with each other and vague as to his financial standing.

The principal difference between Shirk and appellants as to the plans and specifications seems to have been the contention as to the character of the inside walls of the building. As we have seen, Barfield's original pencil sketch showed all steel superstructure, which was accepted by Shirk. But afterward it was found that the north and south walls of the building, as party walls, were required to be of solid masonry by the city ordinances, and Dr. Clarke and Barfield accordingly changed not only these walls, but also the inside walls, to masonry, without notifying Shirk or getting his approval. To these inside walls Shirk objected as soon as he became aware of their character, and has always strenuously maintained that they must be of steel construction, objecting also to the iron work that was being put into

the building, and claiming that the lease called for steel only. By the terms of the lease the building was to "be constructed of steel, brick, terra cotta, stone and granite." Barfield, appellants' architect and main witness, testified that the plans and specifications were not in accordance with the terms of the lease as to the kind of building to be constructed; that the lease did require steel walls, as he understood it; that the difference in cost would have been about \$1200; that brick would have been that much cheaper than steel; that it was not true that Shirk had at any time refused to approve the plans when presented to him.

It seems clear to us that Shirk was not to blame for the discontinuance of the work. He at no time ordered it stopped, but insisted that he wanted the building constructed according to agreement. His letters and conduct seem to evince a desire to have the work done promptly, and to do all he could to expedite the same by examining the plans and specifications, if they were only presented to him. He wrote repeatedly about them. Appellants claim that he was chargeable with notice after having received the plans and specifications, in November. On this point there is a direct conflict of evidence, Shirk saying that he only received specifications for the masonry work, and Barfield that he had sent specifications of the cut-stone and plumbing work also. The contracts, however, had been let by Barfield before any specifications were even sent to Shirk for approval. Taking all the testimony together, we do not find that Shirk was estopped from insisting on his right of approving the specifications, and that the contention of appellants that he avoided passing upon the plans and specifications, and that he acted fraudulently and not in good faith in the matter, is not borne out by the record.

It is insisted by appellants that the trial court erred in refusing to allow them to prove by an expert contractor and builder that the lease and contract did not call for a

building of steel construction. Appellants' offer was as follows: "We now offer to prove by Mr. George A. Fuller, who is here in the court room, and who is an old resident of Chicago and a practical builder and contractor of many years' experience, and who has probably built more of the high modern buildings than any other person in Chicago, that the ground lease and the contract involved herein do not provide for a building of steel construction." The court properly held that it was the province of the court to construe the contract and lease. It will be observed that the offer was, not to prove by expert testimony the meaning in the art or trade of building of technical words used in the lease and contract, so as to enable the court, in the light of such testimony, to put the proper construction upon them, but the offer was to prove by expert testimony what the proper construction of the entire contract and lease was with reference to whether the building was to be one of steel construction or not. If there was any ambiguity in the contract in the respect mentioned, the court would consider the evidence tending to prove the interpretation which the parties themselves had given the contract and lease, and the expert testimony, as offered, would not have been proper, as it would, for this reason and others apparent, have invaded the province of the court.

It is apparent, we think, that the contract was a hard one for Clarke, and that upon his death his representatives were unable to carry it out, but we cannot on that account, under the bill and evidence in this case, rescind it and compel a re-conveyance of the property by Shirk, as prayed in appellants' bill. The bill was properly dismissed for want of equity. The cross-bill was also properly dismissed without prejudice, for if appellee Shirk is entitled to a forfeiture he has a remedy at law. Equity does not look with favor upon forfeitures.

Finding no error, the decree will be affirmed.

*Decree affirmed.*

A. H. BLACKALL *et al.* v. CHARLES E. MORRISON, *Exr. et al.*  
and

JOHN D. WARE v. CHARLES E. MORRISON, *Exr. et al.*

*Opinion filed November 8, 1897—Rehearing denied December 14, 1897.*

1. RECEIVERS—*receiver must pay rent as provided by order of court.* A receiver of a drug company, who takes possession of the premises leased by it under an order of the court requiring him to carry on the business of the company and pay the rent reserved in the lease until the further order of the court, and who makes the payments as provided until the insolvency of the lessor, retaining possession of the premises, after such insolvency, during the time when proceedings were pending in court to determine to whom the monthly rental should be paid, cannot insist that the rent for such time should be the reasonable rental value of the premises, and not the rent named in the order.

2. SAME—*when receiver of lessee is bound by terms of lease concerning sum deposited as forfeit.* A sum deposited with the lessor by the lessee, covering the last months of his five year lease, which it is stipulated in the lease shall be forfeited to the lessor as liquidated damages in case of the lessee's failure to carry out the lease, can not be applied by the receiver of the lessee as part payment of the rent for the time the premises were occupied by him, where the amount of damages sustained by the lessor by reason of the lessee's inability, through insolvency, to complete the lease exceeds the amount deposited as forfeit.

*Morrison v. Blackall*, 68 Ill. App. 504, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

Ezekiel Morrison, on the second day of December, 1891, executed a lease to A. H. Blackall and E. S. Blackall, composing the firm of Blackall & Son, for the first floor and basement of the premises known as 121 South Clark street, Chicago, at an annual rental of \$8500, or \$708.33 per month, for a period of five years, from the first day of May, 1892, until the last day of April, 1897. Blackall & Son afterwards, on the same day, leased the same

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premises to the Economical Drug Company for a period of five years, from May 1, 1892, to April 30, 1897, for the annual rental of \$10,000, or \$833.33 per month in advance, and the drug company paid the sum of \$2500 to Blackall & Son for the rent for the last three months of the said period, to-wit, February, March and April, 1897. Said lease contained a reference to the said \$2500, which was as follows: "The same is to be forfeited to the parties of the first part (Blackall & Son) as liquidated damages in case of the failure of the party of the second part to carry out the covenants and make prompt payment of the rent reserved under the lease."

On the 12th day of July, 1893, the Superior Court of Cook county, by virtue of a bill filed by various judgment creditors of the Economical Drug Company, appointed James W. Nye receiver of the estate and effects of the said drug company, and directed said receiver to continue its business under the order and direction of the court. On the 26th day of July, 1893, the receiver filed a petition in the Superior Court, asking, among other things, for an order in relation to the payment of rents to said Blackall & Son for the premises described in the lease hereinbefore mentioned, upon which petition the court entered the following order: "That the receiver herein pay to A. H. Blackall & Son the sum of \$833.34 as rent for the month of July, 1893, and the like sum of money as rent for each succeeding month until the further order of this court." In pursuance of this order the receiver conducted the business of the said drug company in the premises described in the said lease, and paid rent therefor to said Blackall & Son at the rate of \$833.33 per month until he learned that the firm of Blackall & Son had become insolvent, which fact came to his knowledge on the 24th day of July, 1894. Blackall & Son made an assignment for the benefit of creditors on the 23d day of July, 1894, and the county court of Cook county appointed the Chicago Title and Trust Company assignee

for the said insolvent firm. The receiver of the Economical Drug Company refused to make payment of two checks which he had issued to Blackall & Son for a portion of the rent due for the month of July, 1894.

In the early part of August, 1894, Ezekiel Morrison served a notice upon said Nye, receiver of the drug company, and Blackall & Son, for the purpose of terminating the lease for non-payment of rent. In pursuance of the notice, he, on the 20th day of August, instituted an action of forcible detainer before a justice of the peace, and about the same time filed a petition in the Superior Court against the receiver, Nye, and in the county court against the assignee of Blackall & Son.

The Chicago Title and Trust Company, as assignee of Blackall & Son, filed a disclaimer of any interest in the lease from Morrison, and on the 28th day of September, 1894, filed a petition in the Superior Court alleging that the receiver of the drug company was still in the possession of the premises in question and refused to pay the two checks for the rent of such premises for the month of July, 1894, and also the rent, under the lease, for the months of August and September, upon the ground that he, as assignee of the drug company, had a right to have the said sum of \$2500 paid to Blackall & Son upon the lease applied to the discharge of any amount due from him for the rent of said premises, and prayed for an order directing the receiver to pay to the trust company, as assignee of Blackall & Son, the amount of the said two checks and the rent for August and September.

On the 18th of October, 1894, John D. Ware, a judgment creditor of the drug company, filed an answer to the petition of the trust company, as assignee of the Blackalls, and also a cross-petition, in which he, among other things, denied that Nye, as the receiver of the drug company, was in any way bound by the conditions of the lease to pay rent to any one, except for such time and period as he should remain in possession thereof under

such order as the court has heretofore or may hereafter make, and that because of the insolvency of Blackall & Son it was unwise and unsafe to pay the said July checks, and that the receiver had refused to pay them solely for that reason; that both Morrison and the assignee of Blackall & Son were demanding the payment of the rent, and that Blackall & Son had paid no rent to Morrison since the date of their assignment; that the said receiver was entitled to have the said sum of \$2500 paid to Blackall & Son applied to the payment of rents, and that the assignee of Blackall & Son and the said Morrison were combining and confederating together to defraud the creditors of the drug company out of the said sum of \$2500; that the premises were not desirable as a location for the business of the receiver of the drug company; that the rental value thereof did not exceed \$500 per month, and prayed the court that, upon a hearing, the assignee of Blackall & Son should be required to answer his petition and the court should order the rent should be set off against the said sum of \$2500, and that the receiver of the drug company should be ordered, within a reasonable time, to secure other premises in which to conduct the business of the said company.

The matter remained pending in the court, during which time the assignee of Blackall & Son, the trust company, filed amended petitions praying for an order for the payment of the accruing monthly rental, in the last of which we find the following: "Your petitioner further shows that it has disowned said lease, as said assignee, and that by reason of said disclaimer the equitable interest in said lease remains in said A. H. Blackall & Son, while the legal title is in your petitioner for the benefit of the said A. H. Blackall & Son, so far as the collection of accruing rents are concerned. Your petitioner therefore prays that an order may be entered herein directing said receiver to pay to your petitioner, for the benefit of

A. H. Blackall & Son, the sum of \$2999.99, which sum is now due from said receiver under said contract of lease."

In the meantime Ezekiel Morrison died, and Charles E. Morrison, his executor, obtained leave of the court and filed an intervening petition, in which he prayed to be made complainant to the various petitions filed by the trust company, assignee; that he adopted said petitions so far as they affected his interests. He made a copy of the lease made by Ezekiel Morrison, deceased, to Blackall & Son part of his petition, and prayed he might be granted the benefit of such relief as it might be found he was entitled to have. Afterwards, the said executor of the estate of said Ezekiel Morrison, deceased, by further leave of the court, filed an amended petition, praying that out of whatever sum was ordered to be paid by the said receiver for the rent of said building, an amount should be ordered paid to him sufficient to discharge the amount stipulated in the lease given by his testator to Blackall & Son to be paid as rent of the premises. Said E. S. and A. H. Blackall, composing the firm of Blackall & Son, filed a petition praying that they might be made complainants to the various petitions filed by the trust company, alleging that they adopted said petitions so far as they applied to their interests, and that such relief might be granted to them as they might be entitled to have.

The issues arising under the various petitions and answers thereto, together with the evidence introduced by the various parties bearing thereon, were submitted to the court, and a decree rendered on the 28th day of April, 1896. The court ordered and decreed that the receiver of the drug company should pay to the Chicago Title and Trust Company, assignee of Blackall & Son, the sum of \$500, balance due for the rent of July, 1894, represented by two checks hereinbefore mentioned, and found that by agreement between Blackall & Son and Morrison the lease was terminated on the 15th day of April, 1895, and that possession of the premises was surrendered on that day;



that the said receiver should pay to Blackall & Son the sum of \$4582.30, being the accrued rent for the premises for August, September, October, November and December, 1894, and January, February, March and to April 15, 1895, less the \$2500 heretofore mentioned, which the court held should be credited the receiver in account between such receiver and Blackall & Son. The court further ordered that the petition of Charles E. Morrison, executor, be dismissed. Morrison, the executor, and John D. Ware, prosecuted separate appeals to the Appellate Court for the First District, where such appeals were consolidated and submitted for decision.

The judgment of the Appellate Court was as follows, viz.: "The order of the Superior Court as to the payment of the \$500 to Moses, Pam & Kennedy, as solicitors for the assignee of A. H. Blackall & Son, is affirmed; and the Superior Court is directed to order the receiver to pay also interest at five per cent per annum on said \$500 from the 31st day of July, 1894, to the date of said decree, said payment of interest to be made to Moses, Pam & Kennedy as solicitors for the assignee of A. H. Blackall & Son. The order dismissing the petition of Charles E. Morrison, executor, is reversed. The order of the Superior Court as to the payment of \$4582.30 to Moses, Pam & Kennedy, as solicitors for A. H. Blackall & Son, is reversed and this cause is remanded to the Superior Court, with directions to order the receiver to pay to Charles E. Morrison, as executor of the estate of Ezekiel Morrison, deceased, the sum of \$708.33 for each of the months of August, September, October, November and December, 1894, and January, February and March, 1895, and at that rate per month up to April 15, 1895, together with interest thereon at the rate of five per cent per annum for each of said monthly payments from the first of each of the respective months for which such payment is to be made; and to order the said receiver to pay to Moses, Pam & Kennedy, as solicitors for A. H. Blackall & Son,

the sum of \$125 per month for the months of August, September, October, November and December, 1894, and January, February, March, 1895, and up to April 15, 1895, together with interest thereon at the rate of five per cent per annum from the first day of each of the respective months for which such payment is to be made."

From the decree of the Appellate Court Blackall & Son and John D. Ware prosecuted several appeals. By stipulation of the parties the appeals were consolidated and submitted for decision in this court.

MOSES, ROSENTHAL & KENNEDY, and PAM & DONNELLY, for appellants A. H. Blackall and E. S. Blackall.

NEWMAN, NORTHRUP & LEVINSON, and KEEP & CROSS, for appellant John D. Ware.

JOHN C. SCOVEL, and WILLIAM J. AMMEN, for appellee Charles E. Morrison.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The errors assigned by appellant John D. Ware present two questions: (a) Should the receiver of the Economical Drug Company have been required to pay rent at the rate of \$833.33 per month, or ought evidence have been received to show the reasonable rental value of the premises occupied by him, and the receiver ordered to pay solely according to the development of such evidence? (b) Should the sum of \$2500 paid Blackall & Son by the Economical Drug Company when the lease for the premises was executed, have been applied as a set-off in favor of the receiver of the drug company against any sums due for the rent of the premises?

The Superior Court entered an order directing the receiver to occupy the premises No. 121 South Clark street and conduct the business of the insolvent drug company there, and to pay rent therefor at the rate of \$833.33 per month until the court should otherwise direct by a subse-

quent order. No other order was entered relative to the place where the business of the drug company should be carried on or as to the amount to be paid for rent of the premises. Pursuant to this order the receiver occupied the premises and transacted the business of the company therein. He paid a monthly rental of \$833.33 until Blackall & Son became insolvent, and then declined to pay for the month of July, for the reason Morrison, the original lessor, Blackall & Son, and the assignee of Blackall & Son, each claimed they were entitled to receive it, and for the further reason it was claimed Blackall & Son had become insolvent and were unable to protect and keep alive the lease by making the necessary payments to Morrison; that the drug company was entitled to demand the return of the \$2500 paid by it to Blackall & Son for the faithful fulfillment of the obligations of the drug company under the terms and conditions of the lease, but if such obligations were performed, to be applied in payment of the rent for the three months last preceding the termination of the lease, or to have such sum set off against the rents. That the rent was too high was not suggested as a ground of refusal to pay rent.

The Chicago Title and Trust Company, as assignee for the firm of Blackall & Son, sought, by way of a petition filed in the Superior Court in the case in which the decree was rendered appointing a receiver for the drug company, to obtain an order of the court directing the payment to it of a portion of the rent, and A. H. and E. S. Blackall, who composed the firm of Blackall & Son, and the executor of the original lessor, Ezekiel Morrison, joined in said petition, and asked the court to determine the merits of their respective claims to the rent for the month of July, 1894, and the accruing rents for the period during which the petitions were pending in court for hearing.

The appellant Ware, who was interested in the assets of the drug company as a judgment creditor thereof, filed an answer to the petition of the trust company, assignee

of Blackall & Son, and a cross-petition, in one instrument. The allegations of the answer and cross-petition relate only to the contentions of the various persons claiming to be entitled to receive the rents, and to the claim that the said sum of \$2500 paid by the drug company to Blackall & Son on the lease should be applied to the payment of the demand for rents. There is an allegation that the premises, on account of the alleged unfavorable surroundings, are unsuitable and undesirable as a location for a drug store, and that the rental value thereof is not above \$500 per month, and a suggestion that the receiver shall be ordered to secure a more advantageous location and at a cheaper rental. The prayer of the petition is, that the court may order that the sum of \$2500 paid to Blackall & Son, as before mentioned, should be applied to any claim for rent against the drug company, and that the receiver of the drug company should be ordered to secure other premises in which to transact the business of the company.

It does not appear the complaint sought to be urged in this court, that the Superior Court should have ascertained and ordered the receiver to pay the reasonable rental value of the premises, was presented by any of the petitions or answers filed in the Superior Court. The allegations of the petition of the appellant Ware are consistent only with the theory he understood the premises were occupied under an order of the court fixing the rental to be paid therefor, and that he desired the court should make further order with relation thereto, directing the receiver to vacate the premises and secure a more desirable and cheaper location. The Superior Court had ordered the receiver of the drug company to occupy the premises in question and conduct the business of the company there, and had fixed the amount he should pay as rent therefor at the sum of \$833.33 per month until the court should otherwise order. The receiver complied with this order, resisted the action of forcible detainer brought

by Morrison to recover possession from him, and continued in the occupancy of the premises during all the period of time for which he was ordered to pay rent by the decree. His occupancy was under the order of the court fixing the amount to be paid as rent, and, no subsequent order having been made, the parties entitled to rent were entitled to receive the amount provided to be paid by the order of the court. It would be highly unjust to allow the receiver to occupy the premises under an order providing for the payment of a fixed sum per month as rent, and after such occupancy had continued for nearly a year, while the parties were contending as to whom the monthly sum was to be paid, to insist that payment of rent should not be made according to the provisions of the order, but that the party entitled to the rent should be required to show by proof the reasonable rental value thereof.

As to the second question presented by the appellant Ware, we think the judgment of the Appellate Court is also correct. The payment of the said sum of \$2500 by the drug company to Blackall & Son was for the purpose of securing the performance by the drug company of its obligations in the lease, with the further provision if such obligations were performed that the sum should be applied in discharge of the rents for the last three months of the lease, and if not performed the same should be forfeited to Blackall & Son as liquidated damages. It is unnecessary we should determine whether the language thus used by the parties should be construed to allow the recovery of only such damages as it should appear had been actually sustained, for the reason the testimony warranted the conclusion the damages actually sustained exceeded the sum of \$2500. The lease had twenty-three and one-half months to run after the date of the last payment ordered to be made by the decree appealed from. Blackall & Son were required by the lease executed by them to Morrison to pay the sum of \$708.33 per month, and the

drug company, under its contract with Blackall & Son, the sum of \$833.33 per month. The difference in these monthly payments is \$125, and to that extent Blackall & Son were damaged by the failure of the drug company to fulfill its obligations to them. A loss of this sum per month for the remaining period of the lease, to-wit, for the period of twenty-three and one-half months, would make a total of \$2937.50.

We agree with the Appellate Court in its conclusion that the Superior Court erred in holding the rents should be allowed as a set-off against the sum paid by agreement of the parties as liquidated damages. It only remains to determine whether the Appellate Court erred in apportioning the fund created by the payment of the rents between the claimants thereto.

The proceeding was pending in a court of equity. Blackall & Son, and Charles E. Morrison, executor of Ezekiel Morrison, deceased, voluntarily became parties thereto, and each expressly prayed the "benefit of such relief as they might be found entitled to in the premises." From every equitable point of view, Blackall & Son, being insolvent, were only entitled to receive the residue after the payment to the executor of Morrison of the amount due him. It would have been manifestly wrong and inequitable to have ordered the entire fund to be paid to Blackall & Son and to have remitted Morrison to his remedy against them in their insolvent condition.

Neither of these parties complains of the decree directing the remainder of the rent for the month of July, 1894, to be paid to the assignee of Blackall & Son. Whether the assignee of Blackall & Son is entitled to receive the amount decreed to be paid to the members of that firm is not raised by the record nor referred to by any of the parties in interest. The appellant Ware is in nowise interested in it. We make no ruling upon that point.

Nor is anything herein said to be construed as determining the right of the executor of the estate of said Mor-

risson, deceased, to the amount to be paid said executor, as against the rights and interests of other parties, if such other parties have intervening rights and interests superior to those of such executor, as herein determined.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

JAMES R. CAMPBELL.

*Opinion filed November 8, 1897—Rehearing denied December 21, 1897.*

1. RAILROADS—*switchman assumes the risk of injuries caused by unblocked frogs in switches.* A switchman employed by a railroad company assumes as a risk incident to his employment the danger of injury which might result to him by reason of the frogs in the switches of the railroad yards being unblocked.

2. ACTION—*cause of action defined.* A cause of action for a personal injury suffered by the plaintiff is the act or thing done or omitted to be done by the defendant which causes the injury.

3. PLEADING—*when amended count alleges facts constituting a distinct cause of action.* Where an original declaration alleges the negligence of the defendant railroad company in furnishing and maintaining in its switch an unsafe frog, which caused the plaintiff's injury, an amended count which alleges, in addition, that the defendant suffered a pile of cinders to remain near the unsafe frog, over which the plaintiff stumbled, catching his foot in the frog, states a new and distinct cause of action. (CARTER, J., dissenting.)

4. SAME—*when amended count is obnoxious to plea of Statute of Limitations.* Where the original declaration fails to state a cause of action for personal injury, an amended count stating a good cause of action, but filed more than two years after the cause of action accrued, is obnoxious to the plea of the Statute of Limitations.

WILKIN, J., dissenting.

*Illinois Central Railroad Co. v. Campbell*, 58 Ill. App. 275, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. NATHANIEL C. SEARS, Judge, presiding.

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182 265

170 163  
88a 89  
88a 461

170 163  
89a 322

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170 163  
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This is an action on the case, brought on April 27, 1892, in the Superior Court of Cook county, by James R. Campbell, the appellee, against the Illinois Central Railroad Company, the appellant, to recover damages for a personal injury suffered by him on May 5, 1891, while in the employ of appellant as a switchman.

The original declaration, which consisted of but a single count, alleged that the plaintiff, while employed by defendant in its freight yards at the foot of Randolph street, in the city of Chicago, and while, with due care and diligence, in discharge of his duty in attempting to couple certain cars in said yards in the night time, caught his right foot in an open and unblocked frog in the railroad track of defendant, and before he could extricate the same from said frog was knocked down and run over by one of the cars of defendant, so injuring his right foot and the first and second fingers of his right hand that, in consequence thereof, the same were afterwards amputated. The negligence charged against the defendant was, that it carelessly and negligently furnished and placed in its said railroad track in said freight yards an unsafe and dangerous frog, that was of old style and dangerous construction and unblocked. On March 8, 1894, the plaintiff amended his declaration by filing an additional count, which charged that the frog was open, and constructed without any blocking or other like means necessary for preventing a person, in walking over the same, from catching his foot therein and being held fast and run over by cars, and that the defendant, carelessly and negligently discharging its duty, wrongfully permitted a certain obstruction, to-wit, a pile of cinders and like material, to be and remain at the junction of its railroad tracks in close proximity to the frog, and that the plaintiff, in the night time, and in the discharge of his duties as switchman, and using due care, etc., stumbled and fell upon the said obstruction, and his foot was there-



by thrown into and caught and held fast in the frog, and he was struck by a car, etc.

A plea of not guilty was filed to the original count, and to the additional count a plea of the general issue and a plea of the two years statute of limitations were interposed. The court sustained a demurrer to the latter plea.

On motion of defendant the court instructed the jury that, under the evidence, the plaintiff was not entitled to recover on the first count of the declaration, holding there was no cause of action therein stated, for the reason that the injury resulting from the unblocked frog was one assumed by plaintiff in his employment. The record shows it was conceded by counsel for appellee the first count of the declaration did not state a cause of action.

At the close of the plaintiff's testimony a motion was made to instruct the jury for the defendant, which was renewed at the close of the entire testimony. Although the trial court held no cause of action was stated in the first count of the declaration, yet on the theory that the second count was not barred by the Statute of Limitations this instruction was refused.

A jury in the trial court returned a verdict in favor of the appellee for \$5000, on which judgment was rendered and which judgment has been affirmed by the Appellate Court. From that judgment of affirmance this appeal is prosecuted.

SIDNEY F. ANDREWS, (JAMES FENTRESS, of counsel,) for appellant.

EDWARD R. WOODLE, for appellee.

Mr. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

On the trial of this cause in the Superior Court of Cook county, that court, on motion of defendant, instructed the jury that under the evidence in the case the plaintiff was

not entitled to recover under the first count of the declaration. When the plaintiff entered the employ of the defendant company he assumed all the risks incident to such employment, including any danger or injury which might result to him by reason of the frogs in the switches of appellant's yard being unblocked. (*Chicago, Rock Island and Pacific Railroad Co. v. Lonergan*, 118 Ill. 41.) The only question to be determined, therefore, on this record is, whether or not the additional count, filed more than two years after the cause of action accrued, was a re-statement of the same cause of action or set forth a new cause.

The Statute of Limitations provides that actions for damages for an injury to the person shall be commenced within two years next after the cause of action accrued. Here the cause of action accrued on May 5, 1891, and the additional count was not filed until March 8, 1894,—nearly three years after the injury. The legal sufficiency of the plea, therefore, depends upon the answer that must be made to the inquiry whether or not the cause of action set up in the new count is the same cause of action originally declared on. The question then is, does the Statute of Limitations apply where the original declaration, instead of insufficiently stating the cause of action, entirely fails to state one.

The statute of this State providing, as it does, that a cause of action for a personal injury accruing to any person shall be commenced within two years next following thereafter, and it being conceded, as in this case, that no such cause of action on which judgment could be rendered was begun or commenced within such period, we hold the rule to be entirely different from those cases in which the cause of action was begun and insufficiently stated, and in which we have held amendments to the declaration or additional counts thereto might be made or filed, so as to sufficiently present the cause of action complained of. Where a declaration fails entirely to set forth a cause of action, and where the negligence of the defendant is not

such as would entitle the plaintiff to recover, and is not sufficient on which to base a judgment for the plaintiff, the Statute of Limitations will interpose, and deny him the right, after the limitation of such statute, to set up and allege new and different grounds, or other and different acts of negligence, on which to base his claim for damages. (*Eylenfeldt v. Illinois Steel Co.* 165 Ill. 185.) The cause of action of a plaintiff against a defendant for a personal injury suffered by the plaintiff on account of the negligent act of the defendant may be regarded as the act or thing done, or omitted to be done, by the one by which an injury results to another. *Swift v. Madden*, 165 Ill. 41; *Buntin v. Chicago, Rock Island and Pacific Railway Co.* 41 Fed. Rep. 744.

The original declaration did not state a cause of action, for the reason that appellee assumed all the dangers incident to his employment, including those to which he might be subjected by reason of the unblocked frogs in the appellant's switch yard. It follows, that any amendment or additional count which set up the same cause as a result of the injuries of appellee would be subject lawfully to the same objection interposed by appellant, and rightfully held by the trial court to not state a cause of action.

If it be true, as stated by appellee in his amended count to the declaration, filed more than two years after his cause of action accrued, that a pile of ashes was permitted by appellant to accumulate near the side of its track, over which appellee stumbled and thus caught his foot in an unblocked frog, we hold such statement to be a separate and distinct cause of action, charging other and different negligence from that alleged in the first count of the declaration, and therefore barred by the Statute of Limitations.

The trial court having held, and we think properly, that no cause of action was stated in the first count of the declaration, and no exception having been made to

the ruling of the court so holding, it necessarily follows that if the additional count, filed after two years, set forth a like and the same cause of action, the same instruction to find for defendant should have been given.

For the reasons indicated in this opinion the judgments of the Appellate Court for the First District and of the Superior Court of Cook county are reversed and the cause remanded.

*Reversed and remanded.*

Mr. JUSTICE WILKIN, dissenting.

Mr. JUSTICE CARTER: I do not concur in the opinion of the court in this case. The first count of the declaration alleged the negligence of the defendant in furnishing and keeping in its track in its freight yards an unsafe frog, which was in a defective and dangerous condition. The amended count set up in addition, in apt words, the negligence of the defendant in suffering a pile of ashes or cinders to be and remain near this defective and dangerous frog, over which pile of ashes or cinders the plaintiff stumbled and caught his foot in the frog, and while using due care was injured, etc. The transaction set up in both counts was the same, and I cannot see that the amended count charged a new cause of action. It merely re-stated, with an additional charge of negligence, the same cause of action. Had the plaintiff recovered under the declaration as it originally stood, no one would claim that in a new action and under a declaration the same as the amended count he could recover again. Both causes of action being the same, judgment in one would bar the other. *Texas and Pacific Railway Co. v. Cox*, 145 U. S. 593, was a case quite similar to this, yet it was held that the amended count or petition did not state a new cause of action.

M. J. NOE, Admr.

v.

J. I. MOUTRAY *et al.**Opinion filed November 8, 1897.*

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1. EXECUTORS AND ADMINISTRATORS—*administrator takes no title to realty.* An administrator takes no interest in the realty save a naked power to sell the same upon the order of the court, in case the personal estate of the intestate is insufficient to pay his debts.

2. JUDGMENTS AND DECREES—*judgment against administrator not a lien upon real estate.* A judgment against an administrator, in his representative capacity, upon a claim against the estate, is not a lien upon the land belonging to the estate.

3. SAME—*essentials of a judgment in order to create a lien.* A judgment, in order to create a lien, must be final and for a definite amount, and one upon which execution may issue.

4. CONVEYANCES—*"creditors," within meaning of section 30 of Conveyance act, must have liens.* A "creditor," within the meaning of section 30 of the Conveyance act, (Rev. Stat. 1874, p. 278,) concerning the taking effect of deeds upon recording, is one who, without actual or constructive notice of a prior conveyance or incumbrance, has reduced his claim to a judgment of the character creating a lien upon the property before the recording of the deed or mortgage.

5. SAME—*parties whose claims have been allowed against administrator are not "creditors."* Parties whose claims against an estate have been allowed by the probate court are not such "creditors" having liens, under section 30 of the Conveyance act, as to entitle their claims to priority over a valid deed executed by the deceased owner during his lifetime, but unrecorded at the time the claims were allowed.

APPEAL from the County Court of Richland county; the Hon. T. W. HUTCHINSON, Judge, presiding.

JOHN LYNCH, Jr., and JAMES C. HOWARD, for appellant:

The order of the county court allowing a claim against the estate of a decedent is a judgment at law. *Propst v. Meadows*, 13 Ill. 157; *Mitchell v. Mayo*, 16 id. 83; *Wheeler v. Dawson*, 63 id. 54.

An allowance of a claim against an estate is a judgment, and, like a judgment of a court of record, becomes

a lien on the land of the intestate. *Wheeler v. Dawson*, 63 Ill. 54.

The statute, in effect, reserves a lien upon the land of an intestate to secure the payment of any excess of indebtedness beyond the proceeds of the personal estate, to be enforced by the administrator for the benefit of the creditors generally. *Vansyckle v. Richardson*, 13 Ill. 171.

Creditors of a deceased person have a lien upon the real estate superior to the rights of devisees or purchasers, and such lien may be enforced in any reasonable time by administration upon and a sale of real estate. *McCoy v. Morrow*, 18 Ill. 519; *Myer v. McDougal*, 47 id. 278; *Reed v. Colby*, 89 id. 104; *Lewis v. McGraw*, 19 Ill. App. 313.

Judgment creditors are within the protection of section 31 of the Conveyance act, and stand as purchasers, and are to be regarded as such. *McFadden v. Worthington*, 45 Ill. 362; *Massey v. Westcott*, 40 id. 160.

The retention of possession and receiving the rents and profits by the grantor after the execution of a deed therefor absolute upon its face manifest a secret trust in favor of the grantor, and render the conveyance void, not only against precedent but subsequent creditors without notice. *Anderson v. Armstead*, 69 Ill. 454; *Jones v. King*, 86 id. 225; *Power v. Alston*, 93 id. 587; *Moore v. Wood*, 100 id. 451.

A judgment creditor and a purchaser are equally protected, and a judgment lien attaches to whatever interest in real estate the records disclose in the judgment debtor, in the absence of notice from other sources. *Buggy Co. v. Graves*, 108 Ill. 459; *Bergman v. Bogda*, 46 Ill. App. 351.

ALLEN & FRITCHEY, and J. I. MOUTRAY, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is a petition, filed in the county court by the appellant, M. J. Noe, administrator of the estate of Joseph Johnson, deceased, for the sale of land to pay debts.

The petition shows the insufficiency of personal assets. It makes defendants thereto the heirs of the intestate, and certain of his grantees, and also certain grantees of his heirs. It also makes, as parties defendant, certain persons holding mortgages, executed upon the premises by the grantees of the heirs. Answers were filed to the petition by these mortgagees and grantees. Exceptions were filed to the answers. These exceptions were overruled. The petitioner abode by his exceptions; and the court dismissed the petition at the costs of the administrator. To this exception was taken, and an appeal has been brought to this court. Without considering the question, whether the pleadings are in proper shape or not, and without going into an elaborate statement of their contents, or of all the facts in the case, we deem it sufficient to state enough of the facts to present the question argued by counsel, and submitted in their briefs.

The property, which the administrator asked to have sold for the payment of the claims allowed against the estate, consisted of eighty acres of land in Richland county. The answers deny, that the deceased intestate owned this tract of eighty acres at the time of his death, and deny the right of the petitioner to a sale of the same for the payment of debts against the estate.

Joseph Johnson, the intestate, died October 9, 1894, leaving him surviving his widow, Sarah L. Johnson, who has sold her interest to the grantees hereinafter named, and, as his only heirs-at-law, two sons, Isaac Johnson and Samuel Johnson, and one daughter, Emily S. Clark, and certain grandchildren, who are minors, the children of a deceased son of the intestate, named William Johnson. William Johnson left a widow named Nancy Johnson. Appellant was appointed administrator of the estate on November 19, 1894. On November 9, 1885, nearly nine years before his death, the intestate, Joseph Johnson, executed a deed of the premises in question to his sons, Isaac Johnson and Samuel Johnson, and his daughter,

Emily S. Clark, and his daughter-in-law, Nancy Johnson. This deed was never put on record until April 9, 1895, nearly five months after letters of administration were taken out. After it was put on record, the grantees therein conveyed their interest in the premises to one J. I. Moutray, who executed a mortgage thereon to the executors of the will of one John H. Clark, deceased. J. I. Moutray conveyed the premises to M. O. Moutray, a single person, who conveyed them to Perce L. Moutray, the wife of J. I. Moutray. Perce L. Moutray and her husband executed a mortgage upon said premises for the sum of \$1500.00 to one R. N. Stotler on September 16, 1895. On November 26, 1894, a claim was allowed against said estate in the county court of Richland county. On January 7, 1895, other claims were allowed against said estate. On March 6, 1895, still other claims were allowed. For all of these claims judgments were rendered. It will be observed, that these claims were allowed, or judgments rendered, before April 9, 1895, when the deed was recorded.

It is claimed on the part of appellees, the Moutrays and their mortgagees, that the intestate conveyed away this property in his lifetime to their grantors, the two sons and the daughter and the daughter-in-law of the intestate; that the land belongs to them, as holding under the grantees of the intestate; and that, at the time of his death, the intestate had no interest therein. On the other hand, it is claimed by the appellant, the administrator, that, inasmuch as the claims in question were allowed against the estate before the deed made by the intestate was recorded, and while the record showed, that the intestate held the title at the time of his death, and that the title was in his heirs thereafter up to the time of the recording of the deed, therefore the rights of the creditors, whose claims were allowed, should have precedence over those of the grantees in the deed, and those holding under them.



Undoubtedly an administrator has no right to sell, for the payment of debts of the intestate, any land which did not belong to the intestate at the time of his death. The question here presented, however, is, whether the holders of judgments against an estate, or against the administrator of an estate, can be regarded as such creditors under the Conveyance act, as that they can subject the land to the payment of their debts, as against the grantees in an unrecorded deed made by the intestate in his lifetime. It is not claimed on the part of the appellant, that the unrecorded deed executed by the intestate in his lifetime was fraudulent, or made for any improper purpose. As between the parties to it, it was certainly a valid deed. The petition makes no attack upon the deed, and does not seek to question its validity in any other respect than that it was unrecorded when the claims were admitted to probate.

Are the parties, whose claims against the estate were allowed, "creditors" within the meaning of section 30 of the Conveyance act? Said section 30 provides that "all deeds, mortgages and other instruments of writing which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers, without notice; and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers, without notice, until the same shall be filed for record." (1 Starr & Cur.—2d ed.—p. 944). In the case of *Martin v. Dryden*, 1 Gilm. 187, a construction was given to this statute, so far as to define the meaning of the word "creditor" as therein used. In that case we said that a "creditor," within the meaning of the recording acts, is "one, who without actual or constructive notice of a prior conveyance or encumbrance, institutes such proceedings, or takes such steps, as effect a lien on the land before the recording of such conveyance or encumbrance, whether the debt be prior or subsequent to

them, and whether the vendor, at the time of conveying or encumbering, had other property sufficient to pay the debt or not." This definition has been followed in many subsequent cases. In *Massey v. Westcott*, 40 Ill. 160, we said: "Under our statutes a purchaser and a judgment creditor having a lien stand upon the same equity." (*McFadden v. Worthington*, 45 Ill. 362; 2 Devlin on Deeds,—2d ed.—sec. 635, and note). As the creditor mentioned in said section 30 must be a judgment creditor having a lien, the further question arises whether a party, who has his claim allowed against a deceased man's estate, is a judgment creditor having a lien upon the real estate of the deceased.

It is well settled, that the administrator takes no estate, title or interest in the realty, save a naked power to sell the same upon the order of the probate court, the exercise of which is conditioned upon an insufficiency of personal assets to pay the debts of the intestate. Under our law the legal title to the personal estate vests in the administrator, but the title to the real estate descends to the heir-at-law. (*Phelps v. Funkhouser*, 39 Ill. 401; *Stone v. Wood*, 16 id. 177; 2 Woerner on Am. Law of Administration, sec. 463). Hence a judgment rendered against an administrator in his representative capacity has no operation as a lien upon land belonging to the estate. (1 Black on Judgments, sec. 409). When a claim is allowed against an estate, such judgment of allowance is merely *prima facie* evidence of the debt due by the estate, so far as the realty is concerned. It is the basis of "a proceeding to try whether or not the realty is chargeable with it." (2 Black on Judgments, sec. 560). It is true that, in many of the decisions rendered by this court, the right of the creditors through the administrator to subject the land of the deceased by sale to the payment of their claims is spoken of as a lien. (*McCoy v. Morrow*, 18 Ill. 519; *Myer v. McDougal*, 47 id. 278; *Reed v. Colby*, 89 id. 104). But the word "lien," as used in these cases, has a qualified meaning, and

not the meaning, which is given to it in the first section of the chapter of the Revised Statutes in regard to judgments. The cases thus referred to are based, for the most part, on the original case of *Vansyckle v. Richardson*, 13 Ill. 171, where we said (p. 173): "The statute, in effect, reserves a lien on the lands of an intestate to secure the payment of any excess of the indebtedness beyond the proceeds of the personal estate. This lien is to be enforced by the administrator for the benefit of the creditors generally." It will be noticed, that the lien reserved is not to secure the amount of the claims, as allowed against the estate, but the excess of the whole indebtedness of the estate beyond the proceeds of the personal estate. Other cases speak of the right of the creditors to subject the land to sale for the payment of their debts as a qualified lien, operating to make the land liable to be charged and not actually subject to charge. Thus in *Bishop v. O'Conner*, 69 Ill. 431, it is said: "It is not accurate to say, that the lands are charged, but rather that they are liable to be charged," etc. This language is adopted and approved in the case of *Wilson v. Schneider*, 124 Ill. 628, where it was said, that the "right of the creditors of an estate to have the realty sold to pay their debts is in the nature of a lien upon the land." Again, in *Harding v. LeMoyne*, 114 Ill. 65, this right of the creditors is spoken of as a mere power vested in the administrator. We there said, (p. 64,) that the administrator "takes no interest in or to the realty. In no event can he take anything more than a mere power, and, in the absence of an insufficiency of personal assets to pay the debts of his intestate, he has no more to do with it than a stranger, having no connection whatever with the estate. And even when such insufficiency in the personal estate exists, he has, as just remarked, but the mere power to sell for the payment of debts; and this right can only be enforced through the instrumentality of some court specially authorized to do so." It is thus apparent, that the right to subject the land to the pay-

ment of the debts is something less than a lien, as the signification of that word is ordinarily understood. It is true, as claimed by counsel, that the order of the probate court, allowing a claim against the estate of a decedent, has been held by this court to be a judgment at law. (*Propst v. Meadows*, 13 Ill. 157; *Wheeler v. Dawson*, 63 id. 54; *Mitchell v. Mayo*, 16 id. 83). But, although such a claim when allowed is called a judgment, yet it is a judgment to be paid in the due course of administration, and not a judgment upon which an execution can be issued. (*Mitchell v. Mayo*, *supra*). In harmony with this view it was decided in *Stone v. Wood*, 16 Ill. 177, that "the judgment against the administrator is not a judgment against, or a lien upon, the land."

It is well settled, that a judgment cannot be a lien upon land without statutory authority therefor. Without going into any discussion of the common law nature of such a lien, it is sufficient to say, that, at the present day, it is the creature of statute. When there is no express statute authorizing a judgment to be a lien upon land, such a judgment does not take effect as a lien in the modern sense of the term. (1 Black on Judgments, sec. 398). In this State there is no statute authorizing a judgment against the estate of a deceased person to be a lien on his real estate. Section 1 of chapter 77 of the Revised Statutes in regard to judgments, etc., provides as follows: "A judgment of a court of record shall be a lien on the real estate of the person against whom it is obtained \* \* \* from the time the same is rendered or revived for the period of seven years and no longer." The judgment, which is thus made a lien upon land, is a judgment against a person, and not a judgment against an estate. It is a judgment against the real estate of a living person, and not of a dead person. The same section 1 provides for the issuance of execution upon such judgment as is therein declared to be a lien. (2 Starr & Cur. —2d ed.—p. 2324). But, as has already been stated, no

execution is awarded upon a judgment against an estate. It is true, that section 27 of the chapter in relation to judgments provides for the issuance of execution upon such a judgment for the purpose of redemption from the sale of real estate of a deceased debtor. Section 27 was discussed and commented upon in *Wilson v. Schneider, supra*. But the authority to issue execution upon such a judgment is limited to the purpose of redemption as specified in section 27.

A valid judgment, in order to create a lien, must possess two qualifications: *first*, it must be final and for a definite sum; and *second*, it must be such a judgment that execution may issue thereon. (12 Am. & Eng. Ency. of Law, p. 104; 1 Black on Judgments, secs. 407, 408; *Mitchell v. Mayo, supra*; Rev. Stat. chap. 77, sec. 1). A judgment or claim allowed against an estate is not final or definite in amount, so far as the real estate is concerned, for two reasons: In the first place, the exact amount of it to be paid by a sale of the real estate cannot be definitely ascertained, until the personal estate of the decedent is exhausted. The administrator must realize upon the personal estate, and apply what he thus realizes to the payment of the debts; and the extent, to which the debts and claims remain unpaid after the application of the personal estate, is the measure of the amount which is to be made by the sale of the real estate. It is evident, therefore, that the final and definite amount of the judgment to be enforced against the land cannot be fixed, until it has been ascertained how far the personalty is insufficient to pay such claims. In the second place, the heirs are not bound by such judgment. When a petition is filed by an administrator to sell the land for the payment of the claims allowed against the estate, the heirs and devisees are required, under the statute, to be made parties. Their interest cannot be affected by the judgment rendered against the administrator without notice to them. They have the right to come into court, and

question and disprove the items, included in, or constituting, such a judgment, if they can. In the proceeding to sell the land, they may set up any defenses which they had no opportunity to set up when such judgment was obtained; and consequently it is not final as to the heirs when originally allowed against the estate. (2 Black on Judgments, sec. 560; *Stone v. Wood*, *supra*; *Diversey v. Johnson*, 93 Ill. 547). Such a judgment against an estate lacks the second qualification above referred to, because execution cannot issue upon it.

If the judgments against Joseph Johnson had been rendered in his lifetime, the holders of them, having no notice, at the time of their rendition, of the unrecorded deed above described, would be entitled to enforce them as prior liens against his lands ahead of the rights of the grantees in such deed. But the creditors here obtained the allowance of their claims against the estate of Joseph Johnson after his death, and after he had in his lifetime conveyed away the land in question. They have no more right to priority over the grantees in the deed unrecorded than if it had been recorded.

For the reasons stated, we are of the opinion, that a creditor, whose claim against an estate has been allowed in the probate court, is not such a judgment creditor, having a lien within the meaning of the recording acts, as entitles him to priority over an unrecorded deed, executed by the deceased in his lifetime, and remaining unrecorded at the time of the allowance of such claim. This view disposes of the only question involved in this case. Accordingly, the county court decided correctly in overruling the exceptions to the answers and dismissing the petition of the administrator. Therefore, the judgment of the county court is affirmed.

*Judgment affirmed.*

C. L. SMITH

v.

## THE ESTATE OF EVERETT B. PRESTON.

*Opinion filed November 8, 1897—Rehearing denied December 14, 1897.*

1. **FORMER CASES**—*Preston v. Smith*, 156 Ill. 359, explained. Expressions used in the opinion in *Preston v. Smith*, 156 Ill. 359,—a case which arose out of the same contract involved in this case,—are explained by the court, and the decision in that case is held not to bar the defense interposed to this action.

2. **CONTRACTS**—*when contract to manufacture and sell patented article is not a sale of the patent.* A contract to manufacture and sell a patented article, which provides for the payment of certain royalties to the patentee and guarantees a specified sum annually, is not an absolute sale of the patent, where the patentee expressly reserves the right to cancel the contract and sell the article covered by the patent himself.

3. **SAME**—*strictly personal contracts terminate by death of party whose personal service is required.* A contract of a strictly personal nature terminates upon the death of the party by whom the personal service is to be performed, and his personal representatives are not liable for its performance.

4. **SAME**—*whether contract is personal depends upon intention of the parties.* Whether a contract is strictly personal in its nature is a question calling for a construction of the contract, and depends upon the intention of the parties.

5. **SAME**—*contract with individual as a "firm"—effect upon its personal character.* The fact that a contract is entered into by one party under the name and style of a firm does not affect its personal character, where the other party knows that he is contracting with an individual and not with a firm.

6. **SAME**—*when contract is strictly personal.* A contract by which a party agrees to manufacture a patented article, and "push the sale" thereof "by advertising, exhibiting and soliciting trade" by salesmen and other employees, and to use his "best efforts to create a large demand and heavy sale," etc., is a contract of a strictly personal nature.

7. **EXECUTORS AND ADMINISTRATORS**—*executor cannot continue testator's business unless authorized by will.* An executor cannot continue the business of his testator unless it clearly appears from the will that such was the testator's intention.

*Preston v. Smith*, 67 Ill. App. 613, affirmed.

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APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

This is an appeal from the Appellate Court for the First District modifying a judgment of the circuit court of Cook county, in which circuit court the case was heard on appeal from the probate court. The appellant herein, C. L. Smith, filed his claim in the probate court of Cook county against the estate of Everett B. Preston for the sum of \$6820.10, and on a trial was allowed \$207.91 as a claim of the seventh class. The claimant appealed to the circuit court, where, upon a trial before the court without a jury, he obtained judgment for \$4335. The executors appealed to the Appellate Court, and there secured a modification of the judgment, reducing it to the same amount allowed by the probate court—\$207.91.

Appellant's claim is based on the following contract:

“CHICAGO, ILL., *Sept. 11, 1891.*

“This agreement entered into between C. L. Smith, of Cleveland, Ohio, and E. B. Preston & Co., of Chicago, Illinois. From the date above mentioned the said C. L. Smith agrees to give E. B. Preston & Co. the exclusive right of manufacturing and selling a certain improved hose attachment and swivel, patented August 20, 1889, (patent No. 409,512,) and that he has not disposed of any right or portion of right to any other person previous to this agreement.

“E. B. Preston agrees to furnish C. L. Smith with what his wants may be for this hose attachment, of any size manufactured, at a margin of twenty per cent above cost, said cost to be agreed upon, and he shall retain the right to sell these goods at market price, agreed upon between him and said E. B. Preston & Co.

“It is mutually agreed that E. B. Preston & Co. shall push the sale of this swivel by advertising, exhibiting and soliciting trade by their traveling salesmen or other employees; shall keep at all times in stock such quantities as will supply the market for demand, and to use their best efforts to create a large demand and a heavy sale of this article.



"Said E. B. Preston & Co. further agree that the royalty paid to said C. L. Smith shall equal at least four hundred and fifty dollars (\$450) per annum. In case they do not reach this amount this agreement can be canceled by C. L. Smith, and a new one made that will be satisfactory to him.

"The said E. B. Preston & Co. further agree to pay C. L. Smith, on or before the 15th of each month following the sales of said hydrant swivels, a royalty of fifty cents per dozen on all  $\frac{1}{2}$  hydrant swivels sold. If any larger size be manufactured hereafter, a price in royalty will be made that will be satisfactory.

"Said E. B. Preston & Co. will furnish said C. L. Smith with statements of sales of this swivel, with sales of each size, and E. B. Preston & Co.'s books shall be open to C. L. Smith at any and all times covering sales of this swivel.

"Signed this eleventh (11th) day of September, 1891.

E. B. PRESTON & Co.,

By C. E. Jenkins, *Mgr.*

C. L. SMITH."

Upon the trial in the circuit court appellant filed his bill of particulars, stating that he relied upon the special guaranty that the royalty to be paid to him under the contract should equal at least \$450 a year; that at the time of the filing of the claim two years' default of the guaranty had been made, and that by reason of the death of Preston, and by virtue of section 67 of chapter 3 of the Revised Statutes, there was due to claimant, under the contract, eleven years, at \$450, making a total claim of \$5850. To this amount had been originally added the sum of \$970.10 due on a certain judgment, which was afterwards paid and omitted from the amount claimed.

It was shown on the trial that the firm of E. B. Preston & Co. consisted of Preston alone, and that he had no partner at the time this contract was made; that his business was that of manufacturing and dealing in hose, brass goods, and the like; that Preston died April 27, 1895; that the appellant knew that he was the only member of the firm, and had seen him personally in reference to the contract before it was signed. The following letters were also introduced in evidence:

"CHICAGO, ILL., Sept. 10, 1894.

"*C. L. Smith, Esq., Springfield, Ill.:*

"DEAR SIR—We hereby notify you that we elect to, and do hereby, cancel a certain contract signed by you and E. B. Preston & Co., by C. E. Jenkins, manager, dated Chicago, Illinois, September 11, 1891, having reference to the manufacture and sale of a certain improved hose attachment and swivel, patented August 20, 1889, (patent No. 409,512,) and that we will proceed no further under that contract. We cancel this contract because the patented article has proved to be unsalable, and, the contract running for no definite time, we have the privilege, after the first year, of canceling the contract when we see fit.

"We do not by this letter mean to admit any liability to you, under this contract, except for royalties on the hose attachment and swivels actually sold by us thereunder. As to these royalties we are, and always have been, willing to account to you at any time.

"Yours truly,

E. B. PRESTON & Co."

"CHICAGO, Sept. 17, 1894.

"*E. B. Preston & Co., care Flower, Smith & Musgrave, Chicago, Ill.:*

"GENTLEMEN—I do not understand that you have the right to cancel, without my consent, a certain contract signed by your company and myself, dated Chicago, Illinois, September 11, 1891, and I hereby notify you that I shall adhere to that contract, and if you fail to perform your part of it I shall hold you liable for all damages.

C. L. SMITH."

By the will of Preston, given in evidence, he appointed three trustees, who were to take immediate charge upon his decease and have entire control of all his estate, and manage and conduct the same to the best advantage, and from the income therefrom to support and maintain his wife and daughter. The trustees were further empowered, at any time during the continuance of their trust and according to their best judgment, to change and convert such portion of his estate as they might deem profitable and expedient into such other valuable property or unquestionable interest-paying securities as should tend to the enhancement of the estate and insure a safe and profitable investment, and to execute the necessary

deeds, etc. It was also provided in the tenth clause as follows: "My expressed intention in regard to the disposal and management of my estate is as follows, namely: that aside from the amount required to pay the several legacies in this my last will and testament above named, the income or interest arising therefrom, so far as may become necessary, and, in case of its insufficiency, such portion of the principal estate, not to exceed in amount the sum of \$6000 per year, as above mentioned and specified, shall be devoted and applied by said trustees to the support and maintenance of my said wife. \* \* \* Upon the arrival at full age of my said daughter, Marguerite, the said trustees shall also, thenceforth and during the full term and end of her natural life, pay over the said Marguerite the whole of the income of said estate as fast as the same shall be received and collected by said trustees," etc.

A number of propositions to be held as law were tendered to the court on behalf of the estate, and refused. The amount of the judgment, \$4335, which the court then gave, was obtained by deducting from amount claimed, viz., \$5850, an agreed set-off of \$524.49, and a rebate of interest from each year's payment that had not matured.

MCGLOSSON & BEITLER, for appellant.

FLOWER, SMITH & MUSGRAVE, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The contract involved in this suit was before this court in the case of *Preston v. Smith*, 156 Ill. 359, Smith having sued Preston for the amount due for two years' royalties under the contract. The appellant claims that the decision in that case bars the appellee from insisting upon the defenses sought to be set up in this action. But the questions in that case were different from those presented here. There it was held merely that Preston

was bound to pay Smith \$450 per annum for the two years during which Preston, before his death, had failed to pay, even though he did not manufacture or sell any goods under the patent, and that the privilege given Smith of canceling the contract on certain conditions did not make it an option contract, and therefore void under the statute. The expression used in the opinion, that "under the contract involved the sale and purchase were both absolute and complete," must be interpreted in that connection, as is shown further by the reasoning in the opinion on this point. It was also there said that this was an executed agreement completely performed, and that a recovery could be had on the common counts. This must also be read in the light of the facts in that case. So far as the two years' duration of the contract there involved was concerned, the contract was executed, and nothing remained to be done but to pay what had accrued under the contract.

Appellant also claims that this contract or agreement was an absolute sale of the patent right by Smith to Preston & Co., to be paid for in installments of at least \$450 a year, as long as the patent right lasted. Of course, if this be so, the estate would be liable for the unpaid purchase money. But we cannot so construe the agreement. Taking into consideration all the terms of the agreement, we think it does not amount to a sale of the patent right by appellant to Preston & Co., leaving no interest whatever in the patent in appellant. On the contrary, he expressly retains the right to sell the article and the right to cancel the contract on certain conditions. Besides, the payments to be made are called "royalties" in the agreement, and are such in fact, Preston & Co. agreeing that they should be at least \$450 per annum.

This brings us to the main question: Was this contract with Preston one of a personal character, which was terminated by his death? That contracts of a strictly

personal nature terminate upon the death of the party by whom the personal service is to be performed, and that in such cases the executors or administrators are not liable for the performance of the contract, is a well settled rule of law. (1 Parsons on Contracts, \*131; Addison on Contracts, sec. 396; Bishop on Contracts, sec. 600.) The only difficulty arises in determining whether or not a contract comes within the rule. As said in *Shultz v. Johnson*, 5 B. Mon. 497, this rule "is not defined and limited in the books with such precision as to render it always easy to determine whether particular cases fall within it or not." Any contract from which it appeared that it was the intention of the parties that the service should be performed by the contractor in person alone, would terminate with his death. (*Janin v. Browne*, 59 Cal. 44.) Where distinctly personal considerations are at the foundation of the contract, the relation of the parties is dissolved by the death of him whose personal qualities constituted the particular inducement to the contract. The whole question in each case is one for construction, and depends upon the intention of the parties. (*Billings' Appeal*, 106 Pa. St. 558.) In contracts in which performance depends upon the continued existence of a certain person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent the parties contracted upon the basis of the continued existence of the particular person or chattel. *Yerrington v. Greene*, 7 R. I. 589; 84 Am. Dec. 578; *Taylor v. Caldwell*, 3 B. & S. 826; 113 E. C. L. 826.

In *Smith v. Wilmington Coal Mining and Manf. Co.* 83 Ill. 498, this court said: "Text writers, noting the decisions on this subject, state the law to be, that when the contract with the deceased is of an executory nature, and the personal representative can fairly and sufficiently ex-

ecute all that deceased could have 'done, he may do so, and enforce the contract. (1 Parsons on Contracts,—6th ed.—p. \*131.) Common law authorities sustaining the doctrine are: *Saboni v. Kirkman*, 1 M. & W. 418; *Wentworth v. Cook*, 10 A. & E. 42. Exceptional cases are, when the contract is of a personal character, or requires, in its execution, the exercise of peculiar skill or taste."

In *Marvel v. Phillips*, 162 Mass. 399, the plaintiff, having invented an improvement in conveyors and an improved elevator, assigned his invention to Phillips, the defendant's testator, taking from him an agreement in writing, by which Phillips agreed to manage the business for the joint benefit of both, to advance all funds requisite, and "to use all reasonable efforts to increase and supply the demand for the Marvel elevator and conveyor,—that is, to do all things which a wise and energetic owner of said patents, with ample financial ability, ought to do," and in a later clause bound himself and his legal representatives to Marvel and his legal representatives. The court held that the agreement was discharged by the death of Phillips, saying: "The chief undertakings were personal in their character. He was to endeavor to create a profitable business under the patents, and to manage it, to advance funds, for the repayment of which he was to look solely to the business, to use all reasonable efforts to increase and supply the demand for the elevator and conveyor, and to do all things which a wise and energetic owner of said patents, with ample financial ability, ought to do. This implies personal skill, attention, and ability of a high order. \* \* \* The different parts of the agreement are not separable. \* \* \* A contract to render such services and to perform such duties is subject to the implied condition that the party shall be alive and well enough in health to perform it. Death, or a disability which renders performance impossible, discharges the contract. Neither Phillips nor his estate is bound to furnish a substitute, nor is the plaintiff bound to accept one."

See, also, *Home Sewing Machine Co. v. Rosensteel*, 24 Fed. Rep. 583.

In *Oliver v. Rumford Chemical Works*, 109 U. S. 81, there was an agreement by Morgan, for the use of whose administratrix this suit was brought by the Rumford Chemical Works, that he would manufacture their self-raising flour, and that he would use all his business tact and skill, and all other means necessary, to introduce and sell the same, and to make the sale thereof as large as in any way possible during the continuance of his license, and in case he failed to perform his covenants the Rumford Chemical Works reserved the right to revoke the license and terminate the agreement. Morgan died soon after. Mr. Justice Blatchford, in delivering the opinion of the court, said: "The right is granted to Morgan alone,—to him personally,—with an agreement by him that he will enter on the manufacture of the self-raising flour, and that he will use all his business tact and skill to introduce and sell the flour. It is apparent that licenses of this character must have been granted to such individuals as the grantor chose to select because of their personal ability or qualifications to make or furnish a market for the self-raising flour, and thus for the acid, all of which was to be purchased from the grantor. The license was made revocable by the grantor on the failure of Morgan to perform his covenants and agreements. We have not overlooked the fact that the privilege granted to Morgan was to continue for five years. This means no more than that he was to have it for five years, if he should live so long and if the patent should not have expired. But it cannot have the effect to impart assignability to the privilege, or to prolong its duration beyond that of his life."

In this case it was "mutually agreed that E. B. Preston & Co. shall push the sale of this swivel by advertising, exhibiting and soliciting trade by their traveling salesmen or other employees; shall keep at all times in

stock such quantities as will supply the market for demand, and to use their best efforts to create a large demand and a heavy sale of this article." Appellant knew, when he signed this contract, that Preston was the whole firm, and he therefore contracted with Preston under the name and style of E. B. Preston & Co., and all the covenants and agreements in the contract were made with Preston alone, although, in referring to him, the plural pronoun is used, as grammatical usage required, its antecedent being "E. B. Preston & Co." No inferences can be drawn from such use of the pronoun. Preston agreed to use his best efforts to create a large demand and a heavy sale of this article. No difference is perceived between this obligation and the ones assumed in the cases cited above, and this cannot be held to be such a contract that an executor would be bound to carry out. Neither does the election of appellant to rely only on the clause stipulating that the royalties should amount to at least \$450 annually, alter the case. The contract is not severable. All its parts must be construed together, and the evident intention of the parties was, that Preston's "best efforts" would or should create such a "large demand and heavy sale of this article" that the royalties on its sale would amount to \$450 annually, as a minimum. It would be unreasonable to hold that Preston's executors should be bound to continue his business for more than ten years in order to carry out this contract. It is well settled that executors are not authorized to continue the business of their testator unless it clearly appears from the will that such is his intention, and if they do so without authority they do it at their own risk. The will of E. B. Preston will not bear such construction. All the expressions used in it would be entirely proper and applicable in the will of any person possessed of large property, and impose no other duty on the trustees than to properly care for the property. The contract having been determined by the death of Preston, such event fixed the time to which



he was bound to pay, and his executors would not be liable under it beyond such date.

There are some other questions raised by appellant, but as they were not submitted to the trial court by any of the propositions asked to be held as law, nor raised in the Appellate Court, they come too late here.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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VIERLING, McDOWELL & Co.

v.

THE IROQUOIS FURNACE COMPANY.

*Opinion filed November 8, 1897—Rehearing denied December 22, 1897.*

1. **CONTRACTS**—*whether an offer was accepted is a question of fact.* Whether there was an acceptance of an offer, so as to constitute a contract, is a question of fact to be determined by the jury.

2. **INSTRUCTIONS**—*instruction submitting to jury whether contract was entered into is proper.* An instruction which submits to the jury the question whether a contract had been entered into is proper, and is not a violation of the rule that the construction of a contract is for the court.

3. **EVIDENCE**—*terms of contract evidenced by "sales memoranda" can not be varied by parol.* A contract to purchase a quantity of iron, evidenced by "sales memoranda" containing no guaranty nor warranty as to quality, but showing that the sales were by sample, can not be varied by parol evidence that the salesman guaranteed the iron to be of a certain quality.

*Vierling, McDowell & Co. v. Iroquois Co.* 68 Ill. App. 643, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

MAHER & GILBERT, for appellant.

McMURDY & JOB, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellee brought an action of assumpsit against appellant, in the circuit court of Cook county, for refusing to receive and pay for certain pig iron according to the terms of three alleged contracts of sale. A trial by jury resulted in a verdict for the plaintiff for \$3484.01, on which the court allowed interest from the date of the verdict and gave judgment for \$3505.76. From a judgment of affirmance in the Appellate Court this appeal is prosecuted.

Plaintiff below claimed that it sold and agreed to deliver to the defendant 1500 tons of iron at an agreed price, and had offered to deliver it in conformity with its agreements, but defendant wrongfully and without lawful excuse refused to receive 687 tons thereof or to pay therefor, to the damage of plaintiff of the difference between the contract price and market price of the iron. The defendant denied that it agreed to purchase the alleged number of tons, or that the plaintiff delivered or offered to deliver to it iron of the quality contracted for. The jury found both these controverted facts in favor of the plaintiff, and by the judgment of affirmance in the Appellate Court they are conclusively settled adversely to appellant.

On the assignment of errors of law it is first contended that the circuit court erred in refusing to instruct the jury that a paper offered in evidence by the plaintiff, dated January, 1892, called "the contract for Omaha iron," was not accepted by the defendant, and that the plaintiff could not recover any damages whatever for a refusal to take iron on that contract. Whether or not the contract named in the instruction was accepted by the defendant was a question of fact, and the court could not properly take it from the jury by an instruction like the one asked. Under our statute trial courts can only instruct the jury on matters of law, leaving them to find the facts.

The contention that the instruction should have been given, on the theory that the testimony offered to prove acceptance of the contract was incompetent, is without force. The competency of such testimony could not be raised by a general instruction of this character.

Neither do we think the court erred in admitting the evidence objected to, consisting of the following letter:

*"Iroquois Furnace Company:*

*"December 23, 1891.*

"GENTLEMEN—Noting yours of November 23, one car soft iron duly received, with proper trial as agreed upon. In accordance with agreement we can use and will require both irons. Kindly send proper sales memorandum, as we have mislaid the original. Both irons tried we have found satisfactory.

VIERLING, McDOWELL & Co."

It is said the witness Foster was permitted, over the objection of counsel for defendant, to testify that this letter was an acceptance of the Omaha contract. We do not so understand his testimony. The letter was before the jury, and the question as to whether it was in fact an acceptance was for them, under proper instructions.

It is again insisted that the court erred in giving instruction No. 2, on behalf of the plaintiff. It seems to be thought the instruction violates the well known rule that the interpretation and construction of written contracts is for the court and not for the jury, but wherein it does so is not suggested or pointed out. As we understand its purport, it did no more than submit to the jury the question whether a contract was entered into, and in no way directed them to construe or determine the force and effect of it.

Another alleged error is the exclusion of testimony offered by defendant for the purpose of proving that an agent of plaintiff, who negotiated the sales, guaranteed the iron sold to be equal to the best Ohio Valley iron, and that he was authorized by the president of plaintiff company to make such guaranty. The sales were made by what are called "sales memoranda," sent by plaintiff

to defendant and accepted by it. The agreements of the parties must therefore be treated as contracts in writing. They contain no guaranty or warranty as to quality. They show the sales to have been by sample. Clearly their conditions and provisions could not be varied by parol. The only question as to quality which could be properly raised by the defendant was, whether or not the iron furnished or offered was up to the samples. The offered evidence was therefore incompetent, independently of the time or manner of offering it. Moreover, the jury were required, at the defendant's own request, to find specially, first, whether the agent was authorized by Eagle, the president of the plaintiff company, to make representations as to the quality of the iron; and second, did such agent represent that the quality should be equal to the best Ohio Valley iron; and they found both facts in favor of the defendant. It was, therefore, in no way injuriously affected by the exclusion of the offered testimony, even if it had been competent. Under these special findings the question would be, are they so inconsistent with the general verdict as that the latter could not be sustained?—which question is neither raised nor discussed, for the reason, doubtless, that the evidence at least tended to show that the iron delivered and offered was equal to the quality represented. At the request of the defendant the jury were also instructed to say whether the iron furnished after the sample cars equaled in grade and quality the iron in the sample cars, and answered that question in the affirmative.

Another ground of reversal urged is, that interest was improperly allowed. It is said this point might have been raised under the contention that the court gave improper instructions; but no errors in the instructions in that regard are pointed out, the sole contention being that the evidence did not justify the allowance of interest to the date of the verdict. Under our statute (Rev. Stat. sec. 2, chap. 74,) interest is recoverable at the rate

of five per cent per annum on money withheld by unreasonable and vexatious delay. Whether there was such delay in this case was a controverted question of fact, and is not open to discussion here. *McLaughlin v. Hinds*, 151 Ill. 403.

The general verdict of the jury and the judgment of the circuit court inevitably followed from the special findings rendered at the defendant's own request, and the judgment of affirmance in the Appellate Court was clearly right.

*Judgment affirmed.*

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EMELINE BARTMESS *et al.*

*v.*

TORRENCE I. FULLER *et al.*

*Opinion filed November 8, 1897.*

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| 170 | 198  |
| 187 | 1577 |
| 170 | 198  |
| 201 | 180  |
| 201 | 182  |
| 170 | 198  |
| 204 | 1485 |

1. EVIDENCE—*advancement cannot be created by parol evidence.* Under section 7 of the act on descent (Rev. Stat. 1874, p. 418,) an advancement cannot be established by parol evidence, but, on the contrary, "the gift or grant must be expressed in writing as an advancement, or charged in writing by the intestate, or acknowledged in writing" by the donee or grantee.

2. SAME—*when cross-bill must be dismissed on account of variance.* A cross-bill in partition proceedings, alleging that the plaintiffs had already received their full share of the property under deeds in the nature of advancements, which they had accepted under an express agreement to release all further claims, must be dismissed where the evidence fails to show any agreement, and tends to establish the advancements by oral evidence alone.

WRIT OF ERROR to the Circuit Court of Crawford county; the Hon. S. Z. LANDES, Judge, presiding.

Daniel Fuller died intestate on February 26, 1895, leaving no widow, but leaving, as his only heirs-at-law, five children, to-wit: two sons, Nelson R. Fuller and Torrence I. Fuller, and three daughters, Rebecca Chiddix, Emeline Bartmess and Lydia A. Shaw. Prior to his death he

owned one hundred acres of land in Crawford county. On February 22, 1894, he executed a conveyance of an undivided one-fifth interest therein to his son, Nelson R. Fuller. On February 26, 1894, Nelson R. Fuller conveyed this undivided one-fifth interest to his brother, Torrence I. Fuller. The deed from Daniel Fuller to Nelson R. Fuller contained these words: "Be it known that this deed does not take effect till my death. I retain control and possession of said lands until my death." Because of these words in the deed, or for some other reason, Torrence claimed that the deed from his father to his brother, Nelson, was defective. Thereupon, on July 28, 1894, Daniel Fuller executed a new conveyance to Torrence I. Fuller, conveying an undivided two-fifths interest. This latter deed was made for the purpose of correcting the supposed defect in the former deed, and at the same time conveyed an additional one-fifth interest.

The original bill in this case is a bill for partition, and was filed by Torrence I. Fuller against his brother, Nelson, and his three sisters, and one Jones, holding a mortgage upon a part of the property. The bill alleges, that complainant owns not only an undivided two-fifths interest, conveyed to him by his father in his lifetime, but that he also owns by descent one-fifth of the remaining three-fifths of the premises, as heir of his father, thus claiming to be the owner of an undivided thirteen twenty-fifths; and that his brother and sisters are the owners, each of an undivided three twenty-fifths, or twelve twenty-fifths in all. The answer of the three daughters of Daniel Fuller admits his death, and sets up, that said deeds were made in pursuance of an agreement between Daniel Fuller and his sons, Nelson and Torrence, by the terms of which the two sons agreed to accept, and did accept, the interests conveyed to them as their share and portion of said premises, in lieu of their expectancy as heirs of their father; and that the residue or remaining three-fifths should descend to the other heirs of Daniel Fuller, free

from all claims of heirship by the two brothers; and that the deeds were made in reliance upon such agreement.

The three daughters also filed a cross-bill, setting up that Daniel Fuller in his lifetime conveyed to his two sons, each an undivided one-fifth interest, (Nelson having sold his one-fifth to his brother Torrence,) and that the sons agreed with their father to accept, and did accept, each his one-fifth interest, in full of their proportionate shares of the premises, and agreed to relinquish their claims as heirs in the residue of said premises; and that Torrence went into possession on the execution and delivery of the deed made on July 28, 1894, and has remained in possession and received the rents and profits of the premises. The prayer of the cross-bill is, that Nelson and Torrence be compelled to specifically perform the agreement, so made with their father, and carry the same into effect, and to account for the rents and the profits. The separate answers of the two sons contained a general denial of the allegations of the cross-bill.

The cause was referred to a master in chancery to take the testimony in the cause; and the master reported back the testimony taken by him. Upon the hearing, the complainant introduced in evidence the three deeds above described, and examined Torrence I. Fuller with reference to the same, and then rested. The defendants to the original bill who were complainants in the cross-bill then submitted the testimony, taken in their behalf before the master. After the introduction of the latter testimony Torrence I. Fuller, the complainant in the original bill, and Nelson R. Fuller, one of the defendants thereto, both being defendants in the cross-bill, moved to dismiss the cross-bill. This motion was allowed, and the court entered a decree, dismissing the cross-bill, and decreeing partition as prayed in the original bill. The present writ of error is sued out for the purpose of reviewing the decree thus entered.

BRADBURY & MACHATTON, and VALMORE PARKER,  
for plaintiffs in error.

CALLAHAN, JONES & LOWE, for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The contention of the plaintiffs in error in this case, as set out in the cross-bill, is, that Torrence and Nelson Fuller, by the deeds executed to them by their father in his lifetime, received each a one-fifth interest in the one hundred acres of land owned by their father, which they would have received as heirs in case of the death of their father intestate without having made such deeds, in lieu of their respective shares as heirs in said premises, and under an agreement that they would release their interests in the remaining three-fifths thereof. The effect of the decree below was to give Torrence and Nelson each one-fifth of said three-fifths, in addition to the two-fifths conveyed to them before their father's death. The cross-bill proceeds upon the theory, not only that the deeds for the two-fifths interest were executed by the father to the sons as an equivalent for their expectant shares in the one hundred acres, but that there was an actual agreement between the father and the two sons, that the sons would accept, and did accept, the interests conveyed to them as their share and portion of said premises, and in lieu of their expectancy therein; and that they would release and relinquish all further claim therein, so that the residue, amounting to three-fifths, should descend to the plaintiffs in error free from any claim on the part of the two sons.

The evidence fails to show, that there was any such agreement made, as is set up by the plaintiffs in error in their answer to the original bill, and in the cross-bill filed by them. The evidence tends to show, that the deeds made to the two sons may have been intended by



the father as advancements to them of their shares in the premises. The cross-bill was dismissed on motion of the defendants in error, upon the ground that the allegations of the cross-bill and the proofs introduced thereunder did not agree. The allegations alleged an agreement, and the testimony tended to show advancements established only by oral admissions. In view of this want of correspondence between the allegations and the proofs, the cross-bill was properly dismissed. It is well settled, that a complainant must recover on the case made by his bill. He cannot be permitted to state one case in his bill, and make out a different case by his proofs. Allegations and proofs must correspond. Even though a good case may appear in the evidence, yet if it differs from the one stated in the bill, the bill will be dismissed. (*Adams v. Gill*, 158 Ill. 190, and cases cited).

There was here no legal advancement to the two sons, because there was no writing evidencing any such advancement. Section 7 of chapter 39 of the Revised Statutes in regard to descent is as follows: "No gift or grant shall be deemed to have been made in advancement unless so expressed in writing, or charged in writing, by the intestate, as an advancement, or acknowledged in writing by the child or other descendant." (2 Starr & Cur.—2d ed.—p. 1432). The evidence here consists of proof of oral statements, made by Daniel Fuller and his son, Torrence Fuller. It is shown that, at various times, Daniel Fuller stated that he had given his sons each one-fifth of the premises, and that his daughters were to have each one-fifth thereof. Torrence Fuller also stated at various times, that it was the intention of his father that each of the children should have one-fifth of the premises. But we have held, that an advancement cannot be established by evidence of this character. Under section 7, as above quoted, an advancement "cannot be created by parol declarations or statements; but, on the other hand, in order to create a valid advancement, the gift or grant must be

expressed in writing as an advancement, or charged in writing by the intestate, or acknowledged in writing by the child or other descendant. This is the plain provision of the statute and it cannot be disregarded." (*Wilkinson v. Thomas*, 128 Ill. 363). None of the deeds above referred to disclose upon their faces anything to indicate, that the interests conveyed were intended as advancements. They contain no allusion to advancements, and it is not claimed that there was any other instrument or writing than these deeds, establishing any charge by the intestate, or acknowledgment by either of the defendants in error as an advancement. The same kind of testimony, consisting of admissions and of declarations, was held to be insufficient to establish an advancement in the case of *Long v. Long*, 118 Ill. 638. But it is contended by plaintiffs in error, that, although the testimony was not sufficient to establish an advancement by the intestate within the statutory meaning of that term, yet that there was a parol agreement on the part of defendants in error to release their interests in the remaining three-fifths of the premises, and to accept the interests conveyed to them in full of their shares as heirs in said premises. The case of *Galbraith v. McLain*, 84 Ill. 379, is relied upon as sustaining the view, that a court of equity will enforce such a parol agreement, as is here set up in the cross-bill. In *Galbraith v. McLain*, *supra*, it was held, that, where a father executes a deed for a tract of land to one child, who accepts and takes possession of the same upon the express understanding and agreement, that it is in lieu of all claims such child may have in or to the residue of his father's estate upon his death, and that such child will release to the other children all his claim in expectancy to the residue of the estate, such contract is legal and binding, and will be enforced in equity. The trouble with the case made by the plaintiffs in error is, that they do not establish any such agreement as is here described. Their cross-bill is a bill for the specific performance of

an agreement. It is well settled, that, where such a bill is filed, the contract sought to be enforced "must be clear, certain and unambiguous in its terms, and must be either admitted by the pleadings or proved with a reasonable degree of certainty." (*Long v. Long, supra*). It was distinctly held in *Long v. Long, supra*, that testimony, showing admissions of the grantee in a deed, that he had received the interest therein described as his share of an estate, does not establish such an agreement as is described in the cross-bill.

We are inclined to agree with plaintiffs in error, that Daniel Fuller intended to convey to his sons the shares, which they would receive as his heirs-at-law at his death in the premises in question, and that they were not to receive any further interest therein after his death, but, however much we may be dissatisfied with the result which has been reached in this case, we are obliged to enforce the law as we find it. The language used in *Long v. Long, supra*, upon this subject is applicable here. In that case we said (p. 649): "If the section of the statute relating to advancements, above cited, was out of the way, \* \* \* appellants, in our judgment, would have a much stronger case than they now have. But the statute is not out of the way, and cannot be dispensed with, although it may result in defeating William Long's intentions in the partial distribution of his property among his descendants before his death. The law must be administered as we find it. An advancement, which is not evidenced in the manner required by the statute, is, in legal effect, no advancement at all, however clearly it may appear it was so intended."

For the reasons here stated, the decree of the circuit court is affirmed.

*Decree affirmed.*

## THE ILLINOIS STEEL COMPANY

v.

JOHN MANN.

*Opinion filed November 8, 1897—Rehearing denied December 21, 1897.*

1. MASTER AND SERVANT—*servant discovering defects in appliances or danger in his surroundings should notify the master.* A servant, upon discovering defects in the machinery or appliances with which he works or danger in his surroundings, should notify the master of such danger or defects.

2. SAME—*upon master's promise to repair, servant may remain in service a reasonable time.* Where the master, upon being notified by his servant of defects in machinery or appliances or danger in the surroundings of the servant which increase the hazard of the latter's employment, promises to repair the defects or remove the danger, the servant may remain in the service a reasonable time without thereby assuming the increased risk.

3. SAME—*time which servant may remain is a reasonable time for the master to fulfill his promise.* The reasonable time for which a servant is entitled to remain in service after his master's promise to repair defects or remedy dangerous surroundings, is such time as would be reasonably sufficient for the master to fulfill his promise. (CARTER, MAGRUDER and BOGGS, JJ., dissenting.)

4. SAME—*rule that servant may rely on master's promise to repair is not applicable to all cases.* The rule that a servant may remain in service a reasonable time relying upon his master's promise to repair defects, does not apply where the servant is performing ordinary labor not requiring intricate machinery and appliances, and has an equal knowledge with the master of all existing defects.

*Illinois Steel Co. v. Mann*, 67 Ill. App. 66, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

This was an action for personal injuries, brought by John Mann, an employee of the Illinois Steel Company, in the circuit court of Cook county, against the corporation which employed him, to recover for injuries alleged to have been received by him while in the employ of the defendant, in its rolling mills, about November, 1892.

The plaintiff was, and had been for about twenty-six years, in the employ of the defendant in the capacity of a heater, his duties being to place steel ingots into a furnace, turning them with an iron bar nine or ten feet long, known as a "paddle," and finally taking them from the furnace when the process of heating was finished. The paddle, which grows hot while in use, is cooled in a long water trough, known as a "bosh." Ordinarily the heater has a helper, who assists him in taking the paddle out of the bosh and putting it into the furnace. Plaintiff had such a helper, but either on account of his inexperience, or a dislike of the plaintiff towards him, or for some other reason immaterial, Mann, on the day in question, attempted to perform his duties without the assistance of this helper. The floor in front of the furnace where he was required to work was made of cast-iron plates, one inch in thickness and about twenty-six by twenty inches in size. These plates, when first put down, are straight and level, but in a short time, from exposure to the great heat of the furnace above and through counter exposure to dampness of the ground beneath, become warped, so that they are higher in some places than others. Such was the condition of the iron floor in front of the furnace where plaintiff was required to do his work, and also around the bosh or trough where the paddle was cooled. These higher places, from more frequent contact of those using the floor, become very smooth,—as the evidence shows, "smooth as glass." The floor around the bosh was more particularly subjected to the exposure of the dampness underneath, from the fact that water was frequently thrown from this trough upon the floor as the paddle was pulled out of the bosh. The record shows the floor at that place was most of the time wet from this cause. The plaintiff, while attempting, without the assistance of his helper, to pull the paddle out of the bosh, and while walking backward over the iron plates, slipped on one of the smooth places of the floor and fell, receiv-

ing the injuries complained of. His own statement as to this injury is as follows:

"I had just about completed pulling the paddle out of the bosh, when, just at the instant I stopped, I pulled the paddle like this and went to lay it on the rail, and my feet went out like that. I stopped walking, and as I stood there tried to pull the paddle back and my feet went out.

Q. "And very likely it was the pull that you gave the paddle that started your feet, was it not?

A. "Well, I don't know about that; I don't know about that; that I couldn't say. I know I fell and the paddle fell on me. I know both my feet went out at once."

It appears from the record in this case that the uneven, smooth and slippery condition of the floor had existed for at least a year prior to this accident, and the condition was fully known to the plaintiff. He had on several occasions during the year notified his foreman of the dangerous condition of this floor, and, while it is not disputed he was fully aware of such dangerous condition, it is urged the defendant had promised to repair the floor, and relying upon this promise the plaintiff had continued in its employ.

A jury in the circuit court of Cook county rendered judgment in favor of the plaintiff for the sum of \$5000. This judgment was by the Appellate Court for the First District affirmed, and, on appeal, comes to this court.

E. PARMALEE PRENTICE, for appellant:

A promise to repair does not relieve an employee from the assumption of hazard, where the danger arises from the ordinary use of familiar agencies. *District of Columbia v. McElligot*, 117 U. S. 621; *Bailey on Master's Liability*, 209-211; *Marsh v. Chickering*, 101 N. Y. 400; *Corcoran v. Gas Light Co.* 81 Wis. 193; *Gowen v. Harley*, 56 Fed. Rep. 974; *Tuttle v. Railway Co.* 122 U. S. 189; *Hayden v. Manufacturing Co.* 29 Conn. 548; *Richards v. Rough*, 53 Mich. 212.

If there had been a sufficiently definite promise, nevertheless plaintiff did not rely upon it. He admits that his conduct was unaffected by any promise. The promise, then, cannot be the basis of a recovery. *Taylor v. Felsing*, 164 Ill. 331; 2 Thompson on Negligence, 1148; *Railroad Co. v. Orr*, 84 Ind. 50; *Counsel v. Hall*, 145 Mass. 468; *Railroad Co. v. Liehe*, 17 Col. 280.

A servant has no right to rely upon the master's promise to repair, beyond a reasonable time. *Swift & Co. v. Madden*, 165 Ill. 41; *Taylor v. Felsing*, 164 id. 331; *Drop Forge Co. v. VanDam*, 149 id. 337; *Brick Co. v. Sobkowiak*, 148 id. 573; *Stafford v. Railroad Co.* 114 id. 244; *Furnace Co. v. Abend*, 107 id. 44; *Railroad Co. v. Watson*, 114 Ind. 20; *Railroad Co. v. Drew*, 59 Tex. 10; *Stephenson v. Duncan*, 73 Wis. 404; *Kroy v. Railroad Co.* 32 Iowa, 357; *Greenleaf v. Railroad Co.* 33 id. 52; *Muldrowney v. Railroad Co.* 39 id. 615; *Lumley v. Caswell*, 47 id. 159; *Way v. Railroad Co.* 40 id. 341; *Russell v. Tillotson*, 140 Mass. 201; *Linch v. Sagmore Manf. Co.* 143 id. 206; *Hart v. May*, 144 id. 186; *Buzzell v. Luconia Manf. Co.* 48 Me. 113; *Sweeney v. Berlin*, 101 N. Y. 520.

A definite promise by the master to repair defects, relied on for a reasonable time, does not absolutely relieve the servant from the assumption of hazard as a matter of law, but raises a question for the jury. *Brick Co. v. Sobkowiak*, 148 Ill. 573; *Counsel v. Hall*, 145 Mass. 468; Beach on Cont. Negligence, sec. 372, note 3; *District of Columbia v. McElligot*, 117 U. S. 621; *Railroad Co. v. Donnelly*, 70 Tex. 371.

GEORGE B. FINCH, for appellee:

A peremptory instruction should only be given when the evidence, with all the legitimate and natural inferences to be drawn therefrom, is wholly insufficient to sustain a verdict for the plaintiff. Where there is evidence tending to sustain the issues on behalf of the plaintiff, the weight to be given thereto must be submitted to the jury. *Railway Co. v. Richards*, 152 Ill. 59; *Purdy v. Hall*,

134 id. 298; *Simmons v. Railroad Co.* 110 id. 340; *Pullman Car Co. v. Laack*, 143 id. 242; *Railway Co. v. Callaghan*, 157 id. 406; *Railway Co. v. Smith*, 162 id. 185; *Post v. Bank*, 159 id. 421.

If the servant notifies the master of defects and the master promises to make the needed repairs, the master thereby takes on himself the responsibility of any accident caused by such defect, happening within such time as the servant may reasonably rely on such promise. *Holms v. Clark*, 6 H. & N. 348; *Furnace Co. v. Abend*, 107 Ill. 44; *Brick Co. v. Sobkowiak*, 148 id. 573; *Weber Wagon Co. v. Kehl*, 139 id. 644.

MR. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

Of the assignments of error made on this record and argued by appellant there is only one proper for this court to consider. The question of the negligence of appellant, and some other questions argued by counsel for appellant, are those of fact, which have been settled by the judgment of the Appellate Court.

Error is assigned by the appellant on the refusal of the trial court to give to the jury, on the trial of this cause, the following instruction:

"The court instructs the jury that an employee who continues in the service of his employer after notice of a defect increasing the danger of the service, assumes the risk as increased by the defect, unless the master promised to remedy the defect; and in the event that the master does so promise, the servant may, while relying upon such promise, remain in the service of the master only for such a time thereafter as would be reasonably sufficient to enable the master to remedy the defect, and that if the master does not, within a reasonable time after such promise, remedy the defect, then and in such event, if the servant continues still in the employ of the master, he assumes the risk as increased by the defect; and the court therefore instructs the jury, that if they believe, from the



evidence in this case, that the standing upon which the plaintiff worked while in the employ of the defendant was defective, that the defendant promised to remedy the same but failed to do so within a reasonable time after such promise, and that the plaintiff continued thereafter to work for the defendant knowing that the defendant had failed to remedy the defect within a reasonable time after such promise, then and in such event the court instructs the jury that the plaintiff assumed the additional risk of the defect in the condition of the floor, and if the jury so finds they will return their verdict for the defendant."

This instruction was refused by the trial court, and it is practically admitted that no other instruction involving the same principle was given to the jury, for the reason, as counsel for appellee insists, it does not contain a correct expression of the law of this State. It is urged as an objection to this instruction that it would inform the jury that the servant may, while relying upon the promises of the master to repair a defect, remain in the service of the master only for such time thereafter as would be reasonable and sufficient to enable the master to remedy the defect, and that if the master does not, within a reasonable time after such promise, remedy the defect, then and in such event, if the servant still continues in the employ of the master, he assumes the risk as increased by the defect of which he himself had knowledge. The trial court not only refused this instruction, but, by another instruction requested by the plaintiff, told the jury that if the defendant promised to repair the defect, and he was led to believe and expect that the floor would soon be repaired, and that he continued to remain in the employment of the defendant up to the time he was injured, irrespective of whether or not such time was a reasonable one in which the defect might have been remedied, the plaintiff was entitled to recover.

It is a recognized rule that it is the duty of the master to furnish to the servant reasonably safe machinery and appliances with which to perform his work, but when the servant discovers that the service has become more dangerous than he anticipated when he entered the employment of the master, or when he discovers defects in the machinery or appliances which make it unsafe for him to longer continue in the employ of the master, or from any other cause he concludes there is danger in continuing further in the service, it is his duty to notify the master of such danger or of such defects in the machinery or appliances connected with his work, and, upon the master being notified, the servant has the right to continue in the employ of the master for a reasonable time awaiting the remedy of such defect. He has the right to rely for a reasonable time upon the promise of the master that such defect in the machinery, appliances or other surroundings connected with his work will be repaired and the machinery made safe, and the right to expect that such promise so made by the master will be fulfilled. If such expectation on the part of the servant, however, is not fulfilled and the defect remedied by the master within a reasonable time, and the servant has full knowledge of the dangerous condition of his machinery, appliances or surroundings, and that he is subjected at all times to prospective injury, it is his duty to quit the service of the master, and not subject himself to further danger.

In the case of *District of Columbia v. McElligot*, 117 U. S. 621, the cause arose out of personal injuries received by a laborer while at work upon a bank of gravel. The evidence tended to show he discovered the bank was in an unsafe condition and asked the supervisor for a man to watch it, whereupon he received assurance such would be done. No such assistance, however was given, but the laborer continued to work for a half day thereafter, knowing the danger, when the bank fell and severely injured him. It was held by the court in that case it was the duty

of the laborer, having knowledge of the dangerous condition of the bank, to exercise diligence and care in protecting himself, without regard to any assurance which he might have received from his employer.

The rule in the above case is stronger than the rule in this State. As a general rule, courts will consider that the master who employs a servant has a better and more comprehensive knowledge of the machinery and materials to be used than the employee. The servant has the right to presume that the materials and appliances which are furnished to him in the performance of his duty are sufficient therefor. This rule, however, is not applicable to all cases, and where the servant has equal knowledge with the master and a full knowledge of all existing defects, and more especially in the performance of ordinary labor in which no intricate machinery is involved, the rule is not applicable. In *Marsh v. Chickering*, 101 N. Y. 400, this exception is recognized, and it is said that the facts that a laborer using ordinary tools and appliances notified the master of a defect of which the servant himself had full knowledge, and asked it to be remedied, and the master promised so to do, do not render the master responsible. The rule in this State is more liberal, however, and permits the servant to remain in the employ of the master for a reasonable time awaiting the remedy of such defects.

In *Corcoran v. Milwaukee Gas Light Co.* 51 Wis. 191, the plaintiff had been employed by the defendant in making general repairs about its building, and had occasionally been required to use a ladder. Upon his statement that the ladder was not safe, the foreman had promised to have a safe ladder provided. Relying upon such promise the plaintiff continued in the employ of the defendant, but the foreman failed to provide such safe ladder. The plaintiff was ordered by the foreman to ascend the ladder and make certain repairs, and, the ladder being unsafe and the floor on which it rested being slippery, the plain-

tiff was injured by the falling of the ladder while ascending it. The court in that case held no liability, saying it has been held by it that in a proper case the servant may rely upon such assurance to remedy defects for a reasonable time, but if he remains in such service after the expiration of such reasonable time he is thereby deemed to waive his objection and assume the risk. To the same effect, also, is *Gowan v. Harley*, 56 Fed. Rep. 974. In that case the court says: "The rule that the master is responsible for damages resulting to the servant from defects in machinery and appliances of which the servant has notified him and which he has promised to repair, governs cases in which machinery or tools that are used in the work are discovered to be dangerously defective while in use, and to cases in which tools and machinery are necessary for the safe performance of the work. It has no application to a case where the service rendered is simply manual labor, without tools and machinery, and where no such tools or appliances are necessary to the performance of the work with a reasonable degree of safety."

In *Stephenson v. Duncan*, 73 Wis. 404, it was held that the servant has the right to abandon the service because it is dangerous, but that he may refrain for a reasonable time from so doing in consequence of assurances by the master that the danger shall be remedied, and he will not be held to thereby assume the risk. But if he continues in the service for a longer time than is reasonable to allow for the performance of the master's promise, he will be deemed to have waived his objection and assumed the risk.

In the case of *Missouri Furnace Co. v. Abend*, 107 Ill. 44, this court said (p. 51): "It is now uniformly stated by text writers, that where the master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the em-

ployment a reasonable time to permit the performance of a promise in that regard without being guilty of negligence, and if any injury results therefrom he may recover, unless when the danger is so imminent that no prudent person would undertake to perform the service. \* \* \* The doctrine on this subject rests on sound principle, and it will be found to be supported by English and American decisions. The reason upon which the rule is said to rest is, that the promise of the master to repair defects relieves the servant from the charge of negligence by continuing in the service after the discovery of the extra perils to which he would be exposed."

In *Counsel v. Hall*, 145 Mass. 468, the plaintiff was employed by the defendant to take charge of an engine and boiler, and plaintiff complained to defendant that the glass water-gauge of the boiler was defective and dangerous, and defendant promised to get a new one. About two weeks after, the gauge exploded, injuring the plaintiff. The court said: "If machinery upon which a servant is employed has become dangerous, and the servant has complained of it and has been promised that it shall be repaired, but is injured before the defect is remedied and while he is reasonably expecting the promise to be performed, the promise is a circumstance to be considered by the jury. \* \* \* If the time for the performance has gone by before the accident, and, as must have been, after the servant knows that the repairs have not been made, there is very strong argument that the servant is no longer relying upon the promise and has decided to take the risk."

In *Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, the plaintiff was engaged in taking clay from the bank. He had objected to go underneath on account of the dangerous condition of the bank, and said that if it should go down he would be injured. One Keily was foreman in charge, representing the defendant, and he insisted there was no danger and ordered the plaintiff to go underneath

and perform his work. Under those circumstances the court, in its opinion, held the plaintiff was not on the same footing with the master, and that his primary duty was obedience, and while he believed it dangerous to go under the bank, and protested, yet where the master sought to allay his fears and induce obedience to his commands by declaring there was no danger, the servant, in such case, having such fears and relying upon such assurances, was entitled to recover. That case, however, presents various differences from the case at bar.

While it is true some cases hold the rule to be, that the servant, after having informed the master of any defects in machinery, tools, appliances or surroundings of his work, and the master having promised to repair and make safe such defects, has the right to rely upon such promise and continue in the employ of the master expecting such promise to be fulfilled, yet the rule in this State, and also in most other States, holds that such expectation on the part of the servant may continue only for a time reasonable for such repairs to be made or defects remedied, and if not so made within a reasonable time, the servant, having full knowledge of such defects, will be considered to have waived the same and subject himself to all the dangers incident thereto. (*Swift v. Madden*, 165 Ill. 41.) In the case at bar, the plaintiff says he had frequently gone to the foreman and told him that the standing where he was working was dangerous, and that the foreman would make an "offish" reply of some kind and say he would fix it. Plaintiff says he spoke to the foreman quite a number of times during the year prior to this accident, the last time being two or three weeks before the injury occurred. He also says, in substance, that he did not place much reliance upon the foreman's word, but supposed, however, the floor would be fixed.

It is apparent from this record the floor was in a dangerous condition. It is apparent, also, the plaintiff was fully aware of this dangerous condition, and had been so

for at least a year. It was his duty, being fully aware of the danger, to have notified the foreman or his employer, which he did. It was his right, also, under the law, having given such notice, to have continued in the work in which he was engaged for a reasonable time only, awaiting the fulfillment of this promise to remedy such dangerous condition. The jury should have been instructed that the law was as stated in the instruction which was refused. The instruction should have been given, and it was error to refuse it. For this error the judgment is reversed and the cause remanded to the circuit court.

*Reversed and remanded.*

Mr. JUSTICE CARTER, dissenting:

I do not agree to the reversal of the judgment in this case, nor to the reasons given for such reversal. So far as the discussion of certain of the facts is concerned, it would seem to be sufficient to say that the judgment of the Appellate Court has finally and conclusively settled the facts in favor of appellee.

I do not find so much fault with the statement of the general rules governing such cases, as I do with the application of such rules to the instruction which the court below refused to give to the jury at the request of the defendant, and for which refusal this court now reverses the judgment. I am satisfied that the instruction in question was erroneous, and that it was properly refused. That instruction, if given, would have told the jury that the servant may, while relying upon the promise of the master to repair, remain in the service of the master *only for such a time after such promise as would be reasonably sufficient to enable the master to remedy the defect*, and that if he continues in such service longer than that he assumes the increased risk. I do not understand the law to be that the time, and that only, which would be reasonably sufficient for the making of the repairs is the measure of the time during which the servant may rely upon the mas-



ter's promise to repair. I submit, with deference to the opinion of the majority of the court, that the reasonable time does not so much relate to the time required to make the repairs, as it does to the time the servant is authorized, in the exercise of reason and prudence, to rely upon his master's promise. I know that the authorities and text-books state in general terms, as stated in the opinion of the court, that the servant may continue, after the promise to repair, in the employment of the master a reasonable time to enable the master to make the repairs and remove the defect. But it does not follow that the measure of such reasonable time is as stated in said refused instruction. Let it be supposed that a case is on trial and the injury to the servant is undisputed. The master admits the defective condition of the machinery or the place where the servant is required to work, and that it caused the injury; admits the servant notified him of such defective condition, and that he gave the servant his promise to make repairs and remove the defects complained of; that he failed to keep his promise and the servant was injured. Then, under the rule stated in the above mentioned instruction and adopted by the opinion of the court, the master would proceed to prove, to relieve himself from liability, that he did not, within such time as would have been reasonably sufficient for the purpose before the injury, make the promised repairs,—in other words, would make a complete defense by proving his own default and negligence, while the servant would be required to prove the master was not in default, but had not, at the time of the injury, had sufficient time in which to make the repairs. Such positions of the parties would, to say the least that might be said, be anomalous.

It seems clear to me that the rule stated in this instruction and adopted by this court is illogical and contrary to reason and natural justice. It is also in conflict with what was held in *Weber Wagon Co. v. Kehl*, 139 Ill. 644. It seems to me that the true rule ought to be, and



is, that the assumption of the increased risk by the master by his promise to repair, whereby the servant is induced to remain, will continue until he fulfills his promise or notifies the servant of his inability or unwillingness to do so, or until such a length of time has elapsed as would, under all of the attending circumstances, make it unreasonable for the servant to longer rely upon the promise. Under such a rule the question would be whether the servant, at the time of the accident, relied, or had reasonable grounds to rely, upon the promise of the master to repair, or had himself assumed the increased risk by continuing in the service after he had ceased to rely upon the master's promise. The rule is stated more broadly than is here contended for in *Anderson Pressed Brick Co. v. Sobkowiak*, 148 Ill. 573, citing *Holms v. Clark*, 7 H. & N. 348. See, also, *Counsel v. Hall*, 145 Mass. 468.

Mr. JUSTICE MAGRUDER: I concur in the views expressed by Mr. Justice CARTER.

Mr. JUSTICE BOGGS: I concur in the dissenting opinion of Mr. Justice CARTER.

WILLIAM F. GORRELL

v.

CHARLES H. PAYSON.

*Opinion filed November 8, 1897.*

1. INSTRUCTIONS—*plaintiff's instructions must not ignore matters of defense.* The giving of an instruction for the plaintiff which ignores matters of defense which there is evidence fairly tending to prove is reversible error.

2. SAME—*misleading instructions not cured by correct instructions of other party.* A misleading instruction which is not corrected by any of the other instructions given for the same party is not cured by the giving of a correct instruction for his opponent.

*Gorrell v. Payson*, 68 Ill. App. 641, reversed.

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| 170  | 213  |
| 74a  | 276  |
| 170  | 213  |
| 177  | 523  |
| 170  | 213  |
| 92a  | *819 |
| 170  | 213  |
| 198a | 102  |
| 198a | *520 |
| 170  | 213  |
| 195  | *179 |
| 196  | *531 |
| 170  | 213  |
| 215  | *868 |

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. EDMUND W. BURKE, Judge, presiding.

This is a suit in assumpsit brought by the appellee, Charles H. Payson, against the appellant, William F. Gorrell, in the circuit court of Cook county, to recover the value of certain services rendered by Payson to Gorrell as an attorney. A trial of the case before a jury in the circuit court resulted in a verdict for plaintiff for the sum of \$5316.37. The plaintiff below, by his attorney, remitted a part of the damages so found by the jury, and judgment was entered against the defendant below for \$4606.38. On appeal to the Appellate Court the circuit court's judgment was affirmed, and this further appeal is now prosecuted.

FRANK L. KRIETE, for appellant.

MANN, HAYES & MILLER, (JAMES R. MANN, of counsel,) for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellee, Payson, rendered professional services, as an attorney, for appellant, Gorrell, for about 204 days, during a period of about eighteen months, in several important civil and criminal cases in which Gorrell was defendant. Gorrell was successful in the litigation. The evidence tends to show, and the judgment of the Appellate Court is conclusive, that the amount recovered by appellee in this case did not exceed the usual and customary charges of attorneys for similar services in such cases. Nor can it be claimed that any other question of fact is open to review here. We have, however, carefully examined the evidence in order to pass upon the alleged error of the trial court in giving to the jury the third instruction asked by plaintiff below.

There was little or no controversy as to the extent of the services rendered by the plaintiff, or as to the question whether the amount of the verdict, \$5316.37, was within the usual and customary charges of attorneys, but the defense was based upon three grounds: First, that Payson came into the cases at his own request, and had agreed with Gorrell that, inasmuch as he desired to remove to Chicago and wished to make a reputation there, he would appear for Gorrell and assist the other counsel, whom Gorrell claimed were sufficient for his needs, in the several suits without any charge except for his expenses; second, that again, before the trial of any of the causes, he agreed with Gorrell that he would render the services without any other fee or reward than the contingent fee which he was to receive in what was called the "\$130,000 suit," which suit has not yet been tried, and concerning which suit the following written contract had been entered into between them:

"FAIRLANDS, August 8, 1892.

"C. H. PAYSON—After consulting attorneys in Chicago, we have decided to take you in the case against the Home Life Insurance Company of New York, brought by myself for \$130,000. If we collect the full amount I will give you \$15,000, and for any less sum recovered will give you, as fees, a sum in the same proportion the amount received bears to the amount sued for.

W. F. GORRELL.

"This agreement is accepted by me this day.

C. H. PAYSON."

—And third, that Payson had, as such attorney, while in the service of Gorrell, betrayed his trust, and had corruptly acted in his own interests and against the interests of his client in matters relating to the said litigation in which he was employed.

The testimony tended to show that the legal services rendered by Payson and the other counsel employed for Gorrell were considered by them necessary and important to a recovery in the \$130,000 suit, although rendered in other cases brought against Gorrell, but which, unless

defeated, would preclude a recovery in his case against the company. We cannot, however, agree with the contention of appellant that, as a matter of law, upon a proper construction of the contract in question, Payson was bound to render the legal services which he did render in the other cases without any compensation except that provided for in the written contract. It does not appear that either party, at the time of entering into the contract of August 8, had in contemplation any other suit than the one therein mentioned, or that the terms of the contract required of appellee any professional services other than what would be reasonably necessary in the preparation for the trial, and in the trial or other disposition or settlement of said cause. But it was clearly true, as the court instructed the jury, that if the charges made against Gorrell in the other cases would, if sustained, defeat a recovery in the \$130,000 suit, such fact would support a promise of Payson to make no extra charge for his services in said other cases. Indeed, if Payson rendered the services for which payment was demanded in this case, under a promise to Gorrell that he would do so for the same compensation mentioned in the written contract, he could not recover in this case, whether such services were necessary, or supposed to be necessary, to a recovery in the \$130,000 suit or not, for he could not, after rendering such services under such a contract, recover a different compensation for them. So that the fact that he and his counsel regarded his success in those several suits as of vital importance to the successful prosecution of the \$130,000 suit, while important in the corroboration of Gorrell's contention, was not, as a matter of law, necessary as a consideration for the alleged promise of Payson. The contract, if any was made, for the alleged extra services had been executed and the services had been rendered, and it would stand according to its terms in a suit of this character, whether supported by a valuable consideration or not.

The volume of evidence in the record is large, and cannot be recited here even to show its importance or its conflicting character, but it is sufficient to say that it tended, with considerable force, to support each of the grounds of defense as relied on by Gorrell. There was a sharp conflict in the evidence on each of these vital questions, and it was of the highest importance to a clear understanding and a just determination by the jury that the instructions should be accurate statements of the law as applied to the evidence then before them, and free from defects which would tend to mislead. The instruction complained of, which was given on the request of plaintiff below, was as follows:

"The court instructs the jury that if they believe, from the evidence, that the plaintiff, Payson, rendered services for the defendant, Gorrell, and that said services were performed for the benefit of said defendant, with his knowledge and consent, then a request will be implied, and unless the jury further believe, from the evidence, that such services were performed as a gift or gratuity, then the plaintiff is entitled to recover what the jury may believe, from the evidence, such services were reasonably worth, according to the usual, customary and ordinary charges made by lawyers for such services, if any, shown in the evidence."

It will be noticed that this instruction entirely ignored the second and third grounds of appellant's defense above mentioned, and all of the evidence in their support,—that is to say, that the services were regarded as necessary or important to the securing of the contingent fee provided for in the written contract, and that Payson had promised to render them for the consideration of said contingent fee; and that appellee had violated his trust as appellant's attorney, and made use of his trust relation for his own benefit and to the injury of appellant in the litigation. Nor was the qualification of the instruction based upon the evidence tending to support the said first

ground of defense. Inasmuch as there was no contention that the services were not rendered, and with the knowledge and consent of Gorrell, the effect of the instruction was to inform the jury that Payson was entitled to recover for such services according to the usual and customary charges made by lawyers, unless the evidence showed that they were performed as a gift or gratuity, even although the jury might believe, from the evidence, that the other two grounds of defense had been established, or that appellant had paid all of appellee's expenses for the time mentioned. It needs no argument to show that this instruction, standing alone before the jury, was erroneous, and the only question is, was it cured by other instructions in the case? It certainly was not cured by any instruction given at the request of the plaintiff, and it is not so contended.

But it is said that appellant cannot complain of the error, because the court gave, at his request, an instruction of the same purport. That instruction was as follows:

"You are instructed that if you believe, from the evidence in this case, that the plaintiff rendered services in the criminal trial and in the conspiracy trial in the United States court to the defendant, in pursuance of a request by the plaintiff of the defendant and the defendant's assent that the plaintiff should be permitted to take part in said trials gratuitously for the plaintiff, for the reputation which the plaintiff might gain thereby, then and in that case the plaintiff is not entitled to recover anything for his fees or compensation for services so performed."

It is apparent from a perusal of the two instructions that counsel are in error in this contention. The instructions are radically different. The first practically directed the jury to find for the plaintiff unless they found that the services were gratuitously rendered, irrespective of the other defenses. The other, that they should not find for the plaintiff if they found that the services were gratui-

tously rendered, for the reputation which the plaintiff might gain thereby. It is manifest that to say to the jury that one of the defenses made was sufficient, if proved, to defeat a recovery, was a very different thing from saying to them that the plaintiff should recover unless that particular defense was established. Besides, the evidence was undisputed that appellant paid to appellee, from time to time while such services were being rendered, the latter's expenses, such as hotel bills, car fare, etc., amounting to upwards of \$1000, and in view of this established fact, and the evidence on the part of appellant that these expenses were paid in pursuance of the agreement between him and the appellee, made at appellee's request, that such services were to be rendered for such expenses and the benefit which would be derived by appellee from participation in the trials of the several causes in question, the instruction was erroneous in characterizing the performance of the services "as a gift or gratuity."

In view of the character of the evidence in this record we do not think it can justly be said that the defects in said third instruction were cured by instructions given at the request of the defendant. In such a case it was not sufficient, as we have heretofore said in other cases, "that some of the defendant's instructions may have stated the law correctly. \* \* \* Plaintiff's instructions should have done the same thing, so that the jury could not have been misled by considering one set or the other of the charges given." (*Wabash, St. Louis and Pacific Railway Co. v. Rector*, 104 Ill. 296; *Hoge v. People*, 117 id. 35; *Chicago, Burlington and Quincy Railroad Co. v. Payne*, 49 id. 499.) Nor do we think it can be said that, when taken together as a series, the instructions were free from error prejudicial to appellant.

For the error indicated the judgments of the Appellate and circuit courts are reversed and the cause remanded for another trial.

*Reversed and remanded.*



WILLIAM H. HIGGINS

v.

ALBERT WISNER.

*Opinion filed November 8, 1897—Rehearing denied December 14, 1897.*

APPEALS AND ERRORS—*error of chancellor as to matters of fact must be clear to warrant reversal.* Errors of the chancellor as to findings of fact upon conflicting evidence must be clear and palpable to authorize a reversal.

APPEAL from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

S. K. DOW, and JOSIAH BURNHAM, for appellant.

JONES & STRONG, F. B. DYCHE, and JAMES E. MUNROE, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a bill in chancery by the appellant, alleging that he was the owner in fee of the west half of lot 8 and all of lots 9 and 10, in Yerby's subdivision of parts of the north-west and of the north-east quarters of section 15, township 30, north, range 14, east, in Cook county, and had possession thereof, and that the appellee pretended to have some interest in the property, and had brought an action of forcible entry and detainer against certain tenants of appellant who were in possession as his tenants, and praying that further prosecution of said forcible entry and detainer suit should be enjoined, and that upon a final hearing a decree should be entered declaring, establishing and quieting his title. Decree was rendered adversely to the appellant, finding that the appellee was the owner of the title to the property in controversy and entitled to possession thereof, and decreeing that the temporary injunction should be dissolved and that the parties in possession of the property should deliver up

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| 175  | 505 |
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| 190  | 155 |
| 190  | 536 |
| 170  | 220 |
| 199  | 204 |
| 170  | 220 |
| 110a | 171 |



the possession to the appellee. This is an appeal from such decree.

It clearly appears,—indeed, practically without dispute,—that appellee is the owner and holder of the government or record title to the property. The principal contention of the appellant is, that he is the owner of the property in question because, as he alleges, it appeared the actual, open, exclusive and adverse possession of it has been held by himself and his grantees under claim of title in fee for more than twenty years prior to the filing of the bill. The bill was filed on the 30th of April, 1888.

The claim of appellant to such possession had its inception in the alleged possession of one Daniel Robertson, beginning, as he asserted, in 1863, and continuing through other persons and himself, all holding in the same line, to the date of the institution of the suit. One of these persons whose possession is included by appellant in his claim of possession was one William Kelly. The appellee claimed the said William Kelly was the tenant of Paul Cornell and George W. Gage, who, appellee further claims, and as it appears from the evidence, were then the owners of the fee of this property and who conveyed their interest to him. Kelly entered into the possession of the property in the fall of 1873, and remained in possession until his death, in 1885, and his widow and children retained possession until the date of the filing of the bill herein. The action of forcible detainer was brought against them by the appellee.

Whether the said Kelly held possession under Gage and Cornell, grantors of the appellee, or under one Reed, grantor of appellant, and afterwards under the appellant himself, was a frictional point of fact. It appeared beyond dispute that Kelly bought a house of Cornell and moved it on the lots by the permission of Cornell; that it was a part of the contract for the purchase of the house that Kelly should be allowed by Cornell to move it upon the lots and there occupy it; but it appears that one Reed,

the grantor of the appellant, while Kelly was in the act of moving the house upon the lots, induced Kelly to acknowledge him as his landlord. Various admissions made by Kelly prior to his death were proven, some to the effect that he recognized one and some that he recognized the other of the parties as his landlord. There was much testimony *pro et con* upon that question, and its true solution depended largely upon the credibility which should be accorded to the different witnesses and the weight and value of their testimony.

It was also a much controverted question of fact whether the premises in dispute were in the actual, open and adverse possession of any one in the years 1863 to 1870, inclusive. On this point the testimony of one George W. Waite is very convincing. He testified he was village engineer and superintendent of public works for Hyde Park, and in the employ of the South Park Commissioners as civil engineer, and a member of a committee to examine real estate designed to be purchased by the commissioners, and that in the discharge of his duties in these several capacities he visited the lots to ascertain whether they were vacant; that he drove upon and over them and inspected them, and that they were not enclosed from 1863 to 1870, and he found nothing on them to indicate they were in the possession of any one, but that they were vacant during all that period of time, and that he so officially reported on more than one occasion. Other testimony strongly supported and corroborated this witness, and still other evidence tended to support the contention of the appellant that his grantors held possession during those years.

Appellant had color of title, but could not succeed under either section of the statute providing for the creation of title within seven years, for the reason he had not paid the taxes. The taxes were paid by the appellee, who held the title deducible of record from the government. It was therefore indispensable to appellant's

claim of title, based upon possession, it should appear from the preponderance of the evidence he, and those under whom he claimed to hold, had had actual, open, adverse and exclusive possession of the property for the period of twenty years. If the possession of Kelly was not the possession of appellant, he could not succeed. If the premises were vacant during the year 1868, 1869 or 1870 he could not establish twenty years' possession. Upon both of these propositions the most favorable view for the appellant is, the evidence was conflicting. The chancellor had facilities superior to ours for reaching a correct conclusion as to the weight of the testimony. He saw and heard the witnesses, and therefore had better opportunity than we have for forming a correct conclusion as to the credibility and weight of their testimony.

In *McCormick v. Miller*, 102 Ill. 208, we said (p. 214): "If, upon a careful consideration of the whole of the testimony bearing on the question, the reviewing court has a well founded doubt as to how the question should have been determined, without any clear conviction the one way or the other, the finding of the court below should not be disturbed."

In *Patterson v. Scott*, 142 Ill. 138, it was said (p. 141): "It was held in *Coari v. Olsen*, 91 Ill. 273, and the rule has been followed in numerous subsequent cases, that in a chancery cause so heard upon conflicting evidence, the error in the finding of the chancellor as to matter of fact must be clear and palpable before it will authorize a reversal, and for the reason that such chancellor has superior facilities for forming an opinion of the relative merit and weight of the testimony given by the several witnesses."

We cannot say the findings of the chancellor in the case at bar, upon the material questions of fact, were clearly and palpably wrong, but, upon the contrary, we think they were correct.

The decree must be and is affirmed.

*Decree affirmed.*

## THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

THE PEOPLE *ex rel.* John F. Ashwill.*Opinion filed November 8, 1897.*

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1. SPECIAL TAXATION—*portions of right of way may be specially taxed to build sidewalks across.* Portions of a railroad right of way included between cross-streets may be specially taxed for the cost of sidewalks built on such streets across the right of way.

2. SAME—*what a sufficient description of portions of right of way taxed for sidewalk.* Portions of a railroad right of way included between cross-streets, specially taxed for the cost of sidewalks built on such streets across the right of way, may be described as being parcels of land on the particular side of the street, having a frontage equal to the distance between the track and the respective limits of the right of way upon each side, and having a designated depth not exceeding the distance between such cross-streets.

3. SAME—*prior to act of 1895 council's determination on benefits was final.* Prior to the amendment of section 17, article 9, of the City and Village act, in 1895, (Laws of 1895, p. 100,) the determination of the city council upon the question of benefits to contiguous property specially taxed for an improvement was final.

4. SAME—*what not a valid objection to application for sale.* It is not a valid objection to an application for judgment of sale of land for a delinquent sidewalk tax levied under proceedings instituted under the Sidewalk act of 1875, (Laws of 1875, p. 63,) that the collector had not exhausted the owner's personal property before resorting to the land, as the part of section 3 of the act of 1875 relating to the mode of collecting a sidewalk tax is unconstitutional.

5. WAIVER—*appearance waives defects in notice of application for judgment of sale.* By appearing and filing objections to the county collector's application for judgment of sale of lands for a delinquent special tax, the owner waives all defects in the collector's notice of the intended application.

APPEAL from the County Court of Cumberland county;  
the Hon. G. MONOHAN, Judge, presiding.

This is an appeal from a judgment of the county court of Cumberland county against delinquent lands belonging to the appellant, situated in the village of Neoga in that county, upon the application of the treasurer and

*ex officio* collector of the county for judgment against the same on account of the non-payment of the taxes and assessments due thereon for the year 1895. The village of Neoga passed ordinances providing for the construction of sidewalks upon certain streets in the village, and providing that the cost therefor should be paid by special taxation of the lots, parts of lots or parcels of land contiguous to and abutting said streets along the line of the improvement according to the frontage on said sidewalks. The appellant company entered its appearance, and filed objections to the entry of judgment against its delinquent lands. Upon the trial of these objections testimony was introduced by the village and by the appellant. The court overruled the objections, and entered judgment in accordance with the application of the collector.

The property specially taxed for the building of sidewalks is described in the delinquent list, as published and as filed in the office of the clerk of the county court, as follows:

"Name of owner: Illinois Central Railroad Company.

Special taxes for local improvements in the village of Neoga.

Description of premises.

Sidewalk between Chestnut and Oak Streets.

First North Street.

|                                | Feet front.            | Amount.  |
|--------------------------------|------------------------|----------|
| N. side and W. of R. R. track. | Frontage, 83x200 deep, | \$174.25 |
| N. side and E. of R. R. track. | Frontage, 96x200 deep, | 201.53   |
| S. side and W. of R. R. track. | Frontage, 83x200 deep, | 174.26   |
| S. side and E. of R. R. track. | Frontage, 96x200 deep, | 201.53   |

Sidewalk between Chestnut and Oak Streets.

First South Street, on both sides.

|                                | Feet front.            | Amount.  |
|--------------------------------|------------------------|----------|
| N. side and W. of R. R. track. | Frontage, 83x200 deep, | \$190.91 |
| N. side and E. of R. R. track. | Frontage, 96x200 deep, | 220.82   |
| S. side and W. of R. R. track. | Frontage, 83x200 deep, | 190.91   |
| S. side and E. of R. R. track. | Frontage, 96x200 deep, | 220.83   |

Sidewalk between Chestnut and Oak Streets.

Second South Street.

|                                | Feet front.            | Amount.  |
|--------------------------------|------------------------|----------|
| N. side and W. of R. R. track. | Frontage, 83x200 deep, | \$174.76 |
| N. side and E. of R. R. track. | Frontage, 96x200 deep, | 201.83"  |

On the trial the following stipulation was entered into: "It is stipulated by the parties in interest, and the Illinois Central Railroad Company, that these sidewalks wherein special assessments were made were built fronting lands as follows: That is to say, that Oak street is east of the track of the Illinois Central Railroad Company and that Chestnut street is west of the track of the Illinois Central, and that both Oak and Chestnut streets run north and south, parallel with the track of the Illinois Central Railroad Company; that there is ninety-six feet between Oak street and the track and eighty-three feet between the track and Chestnut street, and that each sidewalk between the track and Oak street was built ninety-six feet, commencing at Oak street and running west to the track on the east side of the track, and the sidewalks were built eighty-three feet commencing at Chestnut street and running east to the track on the west side of the track, and that the assessments were made against the land fronting, adjoining and contiguous to each sidewalk; that First South street and Second South street and First North street run east and west, in said village of Neoga."

CLARK & SCOTT, for appellant.

SMITH MISNER, State's Attorney, JAMES W. CRAIG, EDWARD C. CRAIG, and EMERY ANDREWS, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—The appellant filed seven objections to the entry of judgment against its property. The first, third and fourth of these objections may be considered together, as they charge in substance that the description of the real estate, upon which the special taxes for the building of the sidewalks were levied, was defective. The lands specially taxed were parts of the right of way of the appellant. The description thereof is alleged to be in-

definite and void for uncertainty; and it is also more particularly averred, that there is no such subdivision of the appellant's right of way or other lands, as is expressed by the list of delinquent lands, lots, etc., filed in the cause.

The property, upon which the special taxes are levied, is described as belonging to appellant. The first sidewalk is described as being a sidewalk between Chestnut and Oak streets on the north side of First North street west of the railroad track. The land contiguous to and abutting upon the sidewalk is described as having a frontage upon the street of 83 feet and a depth of 200 feet; the second sidewalk is described as being upon the north side of the street and east of the railroad track having a frontage on the street of 96 feet and a depth of 200 feet; the third and fourth sidewalks are described as being on the south side of said street west and east of the railroad track, and having the same frontage and depth respectively as above stated; four other sidewalks are described as being between Chestnut and Oak streets on both sides of First South street west and east of the railroad track, having respectively the same frontage and depth as above indicated; also two other sidewalks are described as being between Chestnut and Oak streets upon the north side of Second South street west and east of the railroad track, having the same frontage and depth as above indicated. The description of the improvement is more particularly set forth in the statement which precedes this opinion. The sidewalks did not extend all the way across the right of way of the railroad company, but only up to the east and west sides of the track. It is conceded by the stipulation, that the distance from the east side of Chestnut street, which was west of the track, to the west side of the track was 83 feet. It is also conceded, that the distance from the west side of Oak street, which was on the east side of the track, to the east side of the track was 96 feet. Hence, each sidewalk upon the west side of the track and the north side of the street abutted upon and

was contiguous to a parcel of land belonging to the railroad company, whose frontage was 83 feet. Each sidewalk upon the east side of the track and north side of the street abutted upon and was contiguous to land of the railroad company, which had a frontage of 96 feet upon the north side of the street. There was no indefiniteness nor uncertainty in the description of the land abutting upon the street. It was that portion of the right of way, which had a certain definite frontage upon the street, and to which was assigned a certain definite depth. In other words, each tract of land specially taxed which was west of the track was 83 feet wide on two sides and 200 feet wide on the other two sides, and each tract east of the track was 96 feet wide on two sides and 200 feet wide on the other two sides. This was the case with the land abutting upon the sidewalks upon the north and south sides of two of the streets west and east of the railroad tracks, and upon the north side of the third street upon the west and east sides of the track. It is not denied, that the frontage of the sidewalks built upon the west side of the track was 83 feet, and that the frontage of the sidewalks built upon the east side of the track was 96 feet. It is probable, that the 200 feet, assigned as the depth of the portion of the right of way specially taxed, was either one-half or the whole of such right of way as lay between the street, on which the sidewalk was built, and the next street crossing the railroad track either north or south of the sidewalk so built. Appellant introduced no proof, showing that 200 feet was not the correct depth of the land having a frontage of either 83 feet or 96 feet.

It is admitted in the stipulation, that "the assessments were made against the land fronting, adjoining and contiguous to each sidewalk." When the property is thus contiguous to the proposed street improvement, it falls within the designation of property that may be specially taxed for the making of the local improvement. (*Kuehner*



v. *City of Freeport*, 143 Ill. 92). Counsel for appellant take the position that, inasmuch as the right of way of the railroad company is an entirety as extending through the whole State, the village authorities had no right to specially tax any particular part of such right of way; and that, if it could specially tax any particular part of such right of way, it could only levy the special taxes upon the whole of the right of way passing through the village and extending from one side of the village to the other side thereof. It is said that the village authorities, by levying an assessment upon a particular portion of the right of way, assumed to make a subdivision of said right of way. This contention is without force. It has been held by this court, that the right of way of a railroad company is subject to special taxation for a local improvement. (*Chicago, Rock Island and Pacific Railway Co. v. City of Moline*, 158 Ill. 64; *Chicago and Northwestern Railway Co. v. Village of Elmhurst*, 165 id. 148, and cases referred to). But the right to specially tax the right of way would be of little value, if the portion of the right of way contiguous to and abutting upon the sidewalk, or other local improvement to be constructed, could have no other description than that which included the whole right of way as passing through a village, town, city or State. Authorities are referred to where levies of special taxes and special assessments and general taxes were held to be invalid on account of defective descriptions. But these cases have no application to the case at bar. For instance, counsel refer to the case of *People v. Chicago and Alton Railroad Co.* 96 Ill. 369; there a piece of land assessed for taxation was designated as lot 15 when there was no recorded plat of the property, of which said lot 15 was supposed to be a part indicating the existence of any such lot as lot No. 15. Here, however, the property specially taxed is not described as a lot in any subdivision, but it is described as a parcel of land having a frontage of 83 or 96 feet and a depth of 200 feet. The

rule is that property must be so described that it can be identified. The property, upon which the present tax was levied, is easily identified by the description in the delinquent list. The present assessment was made under the act of April 15, 1875, providing for the construction of sidewalks in cities, towns and villages. Section 1 of that act provides that sidewalks may be constructed "by special taxation of the lot, lots or parcels of land touching upon the line where any such sidewalk is ordered." There is here no limitation of the right of special taxation to any "lot" or "lots," but the taxation may be upon any "parcel of land" as well as upon any "lot" or "lots." The description used in the present delinquent list is certainly the description of a parcel of land. (1 Starr & Cur. Stat.—2d ed.—p. 857).

So, in the case of *People v. Dragstran*, 100 Ill. 286, referred to by counsel, the description was "the north half of the north-east quarter of section 1 giving no township and range." The description there was held to be defective, and the court was held to have no jurisdiction to render the judgment, because the description did not indicate in what township and range section 1 was located. As there were several sections 1 in the county, and as there was nothing in the record to show which section 1 was intended, there was no means of identifying the property described in the delinquent list. No such defect exists here. The objection, that the description is defective and uncertain, is not well taken.

*Second*—It is objected, that the notice, published by the county collector of his intended application for judgment against the lands and lots delinquent for the taxes of 1895 in said county, was irregular and void, and that the certificate of publication of the list was uncertain, irregular and insufficient. As to this objection, it is sufficient to say, that the appellant entered its appearance in the court below, and there filed objections and introduced testimony in support of its objections; and, hav-

ing thereby submitted to the jurisdiction of the court, it waived any defect which existed in the publication notice. In personal actions, if the defendant appears and pleads to the merits, he thereby submits himself to the jurisdiction of the court, and it makes no difference whether the notice given by publication was defective or not, or whether there was any advertisement of the notice at all or not. The same rule, which holds good in personal actions, is also applied to applications for judgment against delinquent property for taxes. (*People v. Sherman*, 83 Ill. 165; *Hale v. People*, 87 id. 72; *Mix v. People*, 106 id. 425). It follows, that the objection as to the notice was properly overruled.

*Third*—The objection is made by counsel for the appellant, that the property specially taxed for the construction of the sidewalk was not benefited in any way by the improvement. This was not a valid objection, because the question of benefits was settled by the determination of the common council when it passed the ordinance providing for the improvement, and was not open for determination upon the application for judgment and sale of the property. (*Chicago and Alton Railroad Co. v. City of Joliet*, 153 Ill. 649). This proceeding was not under the amendatory act of June 21, 1895, referred to in *Chicago and Northwestern Railway Co. v. Village of Elmhurst*, *supra*.

*Fourth*—The next objection made by appellant is, that the special taxes for the construction of the sidewalks were not levied under or by virtue of any valid or subsisting ordinances of the village of Neoga. In support of this objection, counsel offered in evidence the ordinances, providing for the construction of the sidewalks, announcing that they so offered them for a particular purpose and no other. When offering them, counsel stated to the court their object to be to show by such ordinances, that no committee was therein appointed to estimate the cost of the sidewalk; that, therefore, no committee could, or did, report to the board of trustees of the village any

estimate of such cost; and that there was no provision in said ordinance, ordering or requesting any one to file a petition in the county court for the appointment of commissioners to make the assessment for the special tax for the building of the sidewalks. The ordinances introduced for the purpose thus indicated were incompetent. The provisions in regard to the appointment of a committee to estimate the cost of the improvement, and in regard to a petition for the appointment of commissioners, etc., are contained in article 9 of part 1 of the City and Village act, and apply altogether to another class of improvements than the construction of sidewalks. The act of 1875 in regard to sidewalks, under which the present proceeding was instituted, contains no provision in relation to the matters specified in the offer made by counsel. We do not deem it necessary to set forth or discuss the manner of determining the cost of sidewalks, or the mode of collecting special taxes therefor, as set forth in said act of 1875. They may be seen by reference to the terms of that act. It is sufficient to say, that the act of 1875 has been held by this court to be valid and constitutional, except in regard to the provisions of section 3 which are hereafter referred to. (*White v. People*, 94 Ill. 604; *Weld v. People*, 149 id. 257; *Craw v. Village of Tolono*, 96 id. 255). This objection was, therefore, properly overruled.

*Fifth*—If we understand the next objection made by counsel, it is this: that the railroad company had at all times, while the warrant for the collection of the special tax was in the hands of the collector, sufficient personal property in the village out of which the special tax could have been collected; and that it was the duty of the collector first to levy upon such personal property before levying the taxes upon the realty. In *Craw v. Village of Tolono*, *supra*, this court expressly held, that so much of the third section of the said act of 1875, as authorized the cost of sidewalks, or any part thereof, to be recovered of

the owners of the property contiguous to the improvement by action at law, was unconstitutional and inoperative; and that so much of section 3, as seemed to authorize a seizure, by warrant issued by the collector, of the personal property of the owner in satisfaction of such special tax, was without constitutional authority and void. (See, also, *Illinois Central Railroad Co. v. People*, 161 Ill. 244). In view of the decisions thus made, the collector had no power to seize the personal property of the appellant under a warrant issued by the clerk. The appellant put the president of the board of trustees of the village upon the stand, and proposed to show by him, that, if any warrants for the collection of this special tax had been issued and placed in the hands of the proper officer, there was personal property enough belonging to the appellant to have paid the taxes. The county court refused to allow this proof to be introduced, and there was no error in this ruling. Hence, this objection was properly overruled.

The judgment of the county court is affirmed.

*Judgment affirmed.*

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WINNIE BATES

v.

JULIA E. SKIDMORE.

*Opinion filed December 22, 1897.*

1. PRACTICE—chancery—complainant may of right dismiss his bill “without prejudice.” The right of a complainant to dismiss his bill, upon payment of costs before final decree, “without prejudice,” does not depend upon the discretion of the court. (*Langlois v. Matthiessen*, 155 Ill. 230, explained.)

2. SAME—dismissal of a bill by complainant and dismissal “without prejudice” have the same effect. The dismissal of a bill by the complainant, on motion, before final decree, and the dismissal of the bill “without prejudice,” have the same effect, to the extent that

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| 111a  | 92  |
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neither is a bar to a new proceeding for the same cause of action between the same parties.

3. SAME—when refusal of court to dismiss complainant's bill "*without prejudice*" is reversible error. The refusal of the court to allow complainant's motion to dismiss his bill "*without prejudice*," on payment of costs, after the cause had been referred to the master but before any testimony had been taken, is reversible error.

APPEAL from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

This is a bill in chancery, filed in the circuit court of Cook county on July 14, 1896, by the appellant, Winnie Bates, for the purpose of setting aside and canceling a deed of certain lots in LaGrange, Cook county, Illinois, executed on May 10, 1890, by George C. Skidmore, the father of appellant, in his lifetime, to appellee, Julia E. Skidmore, the wife of said George C. Skidmore. George C. Skidmore died intestate on April 15, 1895, leaving him surviving, as his only heirs-at-law, his daughter, the appellant, and his widow, the appellee. An answer was filed to the bill on December 9, 1896, by the appellee, the defendant below. On December 16, 1896, the cause was referred to one of the masters in chancery of the court to take proofs and report the same with his opinion on the law and the evidence. On January 12, 1897, the complainant below, appellant here, moved to dismiss her bill without prejudice at her own cost. This motion was denied by the court; thereupon the master received certain testimony, oral and documentary on the part of the defendant, and made a report to the court recommending a decree upon the issues involved in favor of the defendant below, the appellee here. No testimony whatever was introduced before the master by the complainant below. One of the solicitors of the complainant appeared before the master merely for the purpose of objecting to the taking of any proof or the hearing of any testimony, for the reason that the complainant had theretofore made a motion to dismiss the bill without prejudice at her own

cost. Objections were filed to the report of the master, which were ordered to stand as exceptions thereto. The court entered a decree, overruling the exceptions to the master's report, and confirming the same, and finding the equities in favor of the defendant below, and dismissing the bill for want of equity, with judgment for all the costs in favor of the defendant and against the complainant. The present appeal is prosecuted from the decree thus entered by the circuit court.

FIREBAUGH & DRAPER, for appellant.

GEORGE W. HALL, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The only question, which we deem it necessary to consider in this case, is whether or not the circuit court erred in overruling the motion, made by the complainant below, the appellant here, to dismiss the bill without prejudice at her own costs. It is assigned for error, that the circuit court erred in denying and overruling said motion. We are unable to see why said motion should not have been allowed.

It is true that, when the motion to dismiss was made on January 12, 1897, the cause had theretofore, to-wit: on December 16, 1896, been referred to a master; but no proof had been introduced, nor had any other steps of any kind been taken before the master, when the motion was made on January 12, 1897. This court has decided, that a complainant may dismiss his or her bill at any time before decree, when no cross-bill has been filed. (*Reilly v. Reilly*, 139 Ill. 180; *Langlois v. Matthiessen*, 155 id. 230).

It is not denied by the appellee, that, if this had been a mere motion to dismiss the bill, appellant would have been entitled to have it allowed. But it is said that this was a motion, not merely to dismiss the bill, but to dis-



miss it without prejudice. It is then contended, that it is within the discretion of the trial court to grant a motion to dismiss a bill in chancery without prejudice or to deny it; that the court was not bound to exercise its discretion in favor of a dismissal of the bill without prejudice, unless some good reason was given why it should be dismissed; and that, in the present case, as no such good reason was given, and as there was no abuse of its discretion by the court, the refusal to dismiss cannot be here insisted upon as error.

In *Reilly v. Reilly*, *supra*, it was said, that there were some cases, which hold that a chancellor has a discretion and may, in certain cases likely to work a hardship to a defendant, refuse to allow a complainant to dismiss his bill; but it was also there said, that such cases were not in harmony with the current of authority, and that we were not inclined to change the rule already adopted by this court, in order to follow such cases. In *Langlois v. Matthiessen*, *supra*, we sustained the action of the circuit court in dismissing a bill without prejudice upon motion of the complainant, although the cause had been heard upon the evidence as reported to the court by the master. In the case last mentioned, we said: "In the case at bar there had not, so far as the record discloses, been any determination of the rights of either party, and there is nothing in the record to show that there was any abuse of discretion by the trial court in permitting the bill to be dismissed without prejudice." It might naturally be inferred from this language that the right to dismiss without prejudice is a matter of discretion with the court; but it was not there intended to lay down any such general rule.

Where a bill is dismissed without any consideration of the merits, and before decree, even though the order of dismissal does not contain the words, "without prejudice," the judgment or decree of dismissal is not *res judicata*, and constitutes no bar to a new proceeding for the



same cause of action between the same parties; such termination of the suit leaves the parties as if no legal proceedings had been taken. (6 Ency. of Pl. & Pr. 986, 987; *Richards v. Lake Shore and Michigan Southern Railway Co.* 124 Ill. 516; *Chamberlain v. Sutherland*, 4 Ill. App. 494). The same is true where the order is, that the bill be dismissed "without prejudice." In other words, the dismissal of a bill by a complainant upon his own motion before the merits are considered, and the dismissal of such a bill by the complainant upon his own motion without prejudice, have the same effect to the extent that neither is a bar to a new proceeding for the same cause of action between the same parties.

In *Ray v. Adam*, 50 N. H. 84, which was a bill for divorce filed by a husband against his wife, and where an entry was made that the suit was "dismissed without prejudice," those words were held to indicate that the bill was not dismissed upon the merits of the case, or because the equities were shown to be with the defendant. In *Kemp-ton v. Burgess*, 136 Mass. 192, it was said: "It is a matter of course to permit a plaintiff to dismiss his bill at any time before hearing upon payment of the costs. \* \* \* Such an order of dismissal is in the nature of a non-suit at law, and not a bar to another bill. \* \* \* When a bill is dismissed upon the motion of the plaintiff, it is a safe and convenient practice, and we think it is our usual practice, to dismiss it without prejudice." This authority certainly holds, that a dismissal of a bill by a complainant at his own costs at any time before hearing is the same as a dismissal of it "without prejudice." In *Vane-man v. Fairbrother*, 7 Blackf. 541, where a complainant in chancery moved the court to dismiss the bill "without prejudice," and the court refused so to dismiss the bill, but dismissed it "with prejudice," it was held that the dismissal would be no bar to another suit for the same cause; and it was there said, in the opinion deciding the case: "Had the order of dismissal contained the words,

'without prejudice,' as desired by the complainant, it would have afforded no more security to his rights than it would without them; and the insertion of the words 'with prejudice,' as insisted on by the court, does not render the order of dismissal peremptory, like a decree of dismissal on the merits. Either set of words is unmeaning in an order of dismissal on the motion of the complainant without a final hearing, as it would have been, had the cause been dismissed on motion of the defendants for want of prosecution." (1 Beach's Modern Eq. Pr. secs. 450, 463).

Under the view thus presented, it would appear that a complainant would have the same right to dismiss his bill "without prejudice" at his own cost before a hearing, as to dismiss it at his own cost before a hearing without stating in the order that it was so dismissed "without prejudice." If this rule is to prevail, it certainly was error in the court below not to grant the complainant's motion to dismiss her bill without prejudice under the circumstances.

But it is true that some authorities hold, that the propriety of permitting a complainant to dismiss his bill without prejudice rests in the sound discretion of the court. (*Connor v. Drake*, 1 Ohio St. 170; *Adams' Eq.* p. 375, note 2; *Chicago and Alton Railroad Co. v. Union Rolling Mill Co.* 109 U. S. 702). But where it is a matter of the discretion of the court, such discretion must be a sound legal discretion, and must be exercised with reference to the rights of both parties. Beach, in the first volume of his work on Modern Equity Practice, at section 450, says: "It is very clear from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice on payment of the costs, is of course, except in certain cases." One of the exceptions is, that a court may refuse permission to dismiss a bill without prejudice, if such a dismissal would work a prejudice to the other party. It is not regarded as prejudice

to the defendant that the complainant dismisses his own bill, simply because the complainant may file another bill for the same matter. Another exception is, that such order of dismissal should not be made, where the defendant has been put to the trouble of making his defense. (1 Beach's Mod. Eq. sec. 450; *Bank v. Rose*, 1 Rich. (S. C.) Eq. 294; *Chicago and Alton Railroad Co. v. Union Rolling Mill Co. supra*).

In the case at bar, we are unable to discover that, if appellant's motion to dismiss had been granted at the time it was made, the appellee would have been prejudiced in any other way, than that she might be liable at some future time to become defendant to another bill of the same character. At the time when appellant's motion was made, appellee had not been put to any trouble in making her defense, nor at that time had it been made manifest that she was entitled to a decree in her favor. Therefore, even if the rule is to prevail that the granting or refusing of a complainant's motion to dismiss the bill at his or her own cost before a hearing is within the sound discretion of the court, we discover no reason upon the face of this record why such discretion should not have been exercised in favor of appellant's motion.

The costs in this case accruing up to the time of making the motion to dismiss, and including such motion, should be paid by the appellant; but all costs incurred subsequent to the refusal of the court to grant such motion should be paid by the appellee. With this direction as to the division and payment of the costs, the decree of the circuit court is reversed, and the cause is remanded to that court, with directions to dismiss appellant's bill without prejudice.

*Reversed and remanded.*

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| 87a | 62   |
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# THE PRAIRIE STATE LOAN AND BUILDING ASSOCIATION v.

LEON NUBLING.

*Opinion filed December 22, 1897.*

1. **LOAN ASSOCIATIONS**—*association clothing its secretary with powers of general agent is bound by his acts.* A loan association which vests its secretary with the management and control of its entire business, so as to make him, in effect, a general agent, is bound by his acts done under such extended authority.

2. **SAME**—*fraud by secretary—what not a cancellation of stock.* Where a member countermands his notice of withdrawal and continues to make his payments to the secretary as before, the facts that the secretary enters the stock on his books as canceled, and fraudulently causes a warrant for its withdrawal value, payable to the member's order but not endorsed by him, to be cashed by the treasurer and appropriates the money, do not amount to a cancellation of the stock.

3. **SAME**—*association liable to member for payments embezzled by secretary.* A loan association is liable to a member for payments on stock made to its secretary, which are appropriated by the latter, and not entered on the company's books or reported as collected, although the secretary has fraudulently caused the stock to be entered upon the company's books as canceled, and has caused a warrant for its withdrawal value to be cashed, the proceeds of which he also appropriated.

4. **SAME**—*one purchasing stock may rely on secretary's representations.* One purchasing stock in a loan association upon the representation of the secretary that it is for sale, and who continues to make payments thereon until the secretary absconds, may recover from the association the amount paid in by him, although the secretary had fraudulently caused the stock to appear on the books as canceled and had re-issued it to the purchaser without the company's knowledge, and never turned in any of the proceeds of the sale or any of the subsequent payments.

5. **SAME**—*when association cannot claim benefit of statute as to amount in treasury applicable to withdrawals.* A loan association which defends a suit to recover payments made on stock on the ground that the complainant was not a member of the association when making the payments, cannot complain that the decree against it orders execution to issue without regard to the provision of the statute concerning the amount in the treasury available to pay claims of withdrawing members.

*Prairie State Building Ass. v. Nubling*, 64 Ill. App. 329, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

Appellant is a corporation duly organized under the Homestead Loan Association act. In January, 1886, Leon Nubling became a member of the association, subscribing for twenty shares of the stock of said association of the fifteenth series. Upon these twenty shares he made regular payments of \$10 per month to one Jacob David, the secretary, until July 14, 1892, when David departed from the State, having embezzled the funds of the association to a considerable amount. All of appellee's transactions were had with David, and all payments were made to David, at appellee's residence. It appears that in June, 1889, appellee wished to purchase a lot, and told David that he needed his money and desired to withdraw from the association, and David called for and appellee delivered to him a pass-book, and possibly a certificate of stock, appellee being informed that it would be necessary for him to sign the certificate of stock to get his money. About two weeks after, Nubling went to David and informed him that he had decided to remain in the association, and David answered, "All right; keep it up; it is a good thing." David then gave Nubling a new pass-book, the first entry in which was, "July 1, \$300, by transfer from old book,—J. David." All previous payments by Nubling had been entered by David in the pass-book which Nubling surrendered to David when he contemplated withdrawing, and from and after the time the new pass-book was delivered by David to Nubling the monthly payments were entered in it by David.

Prior to November 20, 1890, David told Nubling that the association had some stock on hand which it would like to sell, and finally Nubling consented to buy it. David represented to Nubling that the amount that had

been paid on the stock which the association had for sale, together with accrued profits, was \$477.50, and on the 19th day of November Nubling purchased, through David, eight shares of stock, and delivered to David a check for \$477.50, and David delivered to him a pass-book with an entry therein, "Transferred November 19, 1890, to Leon Nubling." From that time on, until July 14, 1892, Nubling regularly made monthly payments of four dollars on account of this last mentioned stock, such payments being made to David at the place of business of Nubling, the same as on the stock in the fifteenth series. The last mentioned eight shares of stock had been owned by one Marco, who had, just prior to its purchase by appellee from David, handed it in for cancellation to David, the secretary. The stock had been indorsed in blank by Marco, and David then received the money from Nubling and made the transfer entry in the pass-book. In addition he had treated it in the usual manner in which canceled stock would be, and had a warrant issue in the name of Marco on the treasurer of the association for the cancellation value of the stock, and though it was payable to the order of Marco, and not endorsed by him, he turned it over to the treasurer as cash. At the time when appellee had first indicated his desire to cancel his stock and withdraw, David had a warrant issue to the order of Nubling for the cancellation value of the twenty shares of stock, and although it was never indorsed by him, David turned this in to the treasurer as so much cash.

It is apparent, therefore, that the status of both these stocks was, that David had treated them on his books as canceled and had appropriated to himself the proceeds of the warrants issued for such cancellation, yet still, as between him and appellee, the stock was existing and David each month collected dues thereon, crediting the same on Nubling's pass-book but making no entry on his own books. The association books showed that both Nubling and Marco had canceled their stock and were no

longer members. Marco had received his money, but got it from Nubling through David. It is not seriously contended, and cannot be, that appellee had ever received a dollar in return. David, the secretary, having absconded, the whole contention is whether appellee or the association shall suffer by his fraud.

The master to whom the cause was referred reported finding the appellant association indebted to appellee in the full amount of his own and the Marco stock, with profits and interest thereon. The Superior Court, on hearing, approved the report and entered a decree in accordance therewith. On appeal to the Appellate Court this decree was affirmed, and by appeal the matter is here presented.

WILLIAMS & KRAFT, for appellant.

SAMUEL J. HOWE, for appellee.

MR. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

The only questions necessary to be considered in the determination of the issues in this case are, whether there was such a cancellation of the stock of appellee in this association as amounted to a bar of his right to recover the money before then paid,—a withdrawal of his membership from the association so that all payments of dues thereafter were unauthorized; and also whether or not the purchase by him from the secretary of this building association of stock presented by another party for cancellation gave him the right or title thereto.

In our view of the case the master in chancery, the circuit court and the Appellate Court have all reached the correct conclusions. The record in this case shows that the twenty shares of stock held by appellee were presented for cancellation at one time, but in fact never were canceled. The by-laws of appellant provide as

follows: "All members desiring to withdraw from the association, as provided by section 6 of the act under which this association is organized, shall be entitled to receive the amount of dues paid by them, less all fines and other charges, and also receive such shares of the profits then accrued as the board of directors may from time to time determine: *Provided*, that no member withdrawing from the association within one year after having joined the same shall be entitled to any interest or profits." Appellee did not receive, after the presentation of his stock, all dues paid by him, together with any portion of the profits then accrued, but before any cancellation of his stock was made he notified the association, through its proper officer, the secretary, that he would not withdraw. He had a perfect right to do this at any time before the cancellation was actually consummated. The mere facts that about that time a fraudulent secretary caused a warrant to be drawn to appellee's order for the withdrawal value of this stock, and without procuring the indorsement of appellee was able to induce this association to cash the warrant, were not such facts as operated to cancel appellee's stock.

Common knowledge of the general conduct and management of associations known as building associations shows that in the majority of cases the secretary of such an association has largely the control of the details of its business. He generally possesses the confidence of its members and patrons, who largely rely on him. Many such associations, under our statute, transact a financial business far in excess of the ordinary bank. Its directors should certainly be held to an ordinary degree of diligence and watchfulness over the interests of the association and over those who handle its funds. There having been no withdrawal or cancellation of this stock, it follows that all payments of dues made to an officer of the association authorized to receive them created an additional liability from the appellant association to ap-



pellee. The fact that the secretary of this association, either fraudulently or otherwise, did not report the collection of these monthly payments of dues to the association does not release the association. As long as he was secretary he was, under the by-laws, the proper officer to receive such payments, and payment to him was to the association.

It is contended that appellee acquired no title to the Marco stock. The Marco stock was not canceled, as the warrant for such purpose was never delivered to Marco nor did he indorse it. It was a fraud on the part of the secretary to appropriate the amount of the warrant to himself. Appellee issued his check for the stock, and the proper representative of the appellant association, who also acted for Marco, received it and assigned the pass-book to appellee, who continued to make payments on this stock. In this association, as in many others of like class, great confidence seems to have been reposed in the secretary previous to his default. Endlich, in his work on Building Associations, (par. 174,) says that the secretary is often the general agent of the association, and often is, in point of fact, the manager of its entire business. Where such control and management are vested in him, even tacitly, the association will be bound by his acts under such extended authority.

Complaint is made that the decree of the Superior Court ordered execution against the association, when the statute provides that only one-half the funds in the treasury shall be applicable to the demands of withdrawing stockholders. There is no merit in this objection. Appellant denied that appellee was a member of its association or had any right to withdraw. After the decree appellee stood in the relation of a creditor, rather than a withdrawing member.

The judgment of the Appellate Court for the First District is affirmed.

*Judgment affirmed.*

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MINNIE HULL *et al.*

v.

THE PEOPLE *ex rel.* George McCormick, County Collector.*Opinion filed December 22, 1897.*

1. SPECIAL TAXATION—*what objections may be considered on application for judgment of sale.* On application for judgment of sale for a delinquent special tax or assessment only such objections may be considered as affect the jurisdiction of the court to render the judgment of confirmation.

2. SAME—*matters of which the confirmation judgment is conclusive.* A judgment confirming a special tax is conclusive, in a collateral proceeding to sell the property for delinquent taxes, as to all objections to the proceedings in the county court, and the alleged failure of the court, and commissioners appointed by it, to comply with supposed requirements in making the assessment roll and confirming the assessment.

3. SAME—*objection that ordinance is void is available in a collateral proceeding.* An objection that a special taxation ordinance is void as without statutory authority, or not within the power of the city council, is available on application for judgment of sale.

4. SAME—*effect of amendment of 1895 to section 17 of City and Village act.* The amendment of 1895 to section 17 of article 9 of the City and Village act (Laws of 1895, p. 100,) does not abridge the city council's power to enact special taxation ordinances, nor require the introduction therein of any new provisions to give them validity, but merely gives a property owner the right, if dissatisfied with the tax, to have the question of benefits submitted to a jury.

5. SAME—*when special taxation ordinance is not invalid.* A special taxation ordinance is not invalid, under the provisions of section 17 of article 9 of the City and Village act, as amended in 1895, because it provides for a special tax upon contiguous property to pay the entire cost of a street improvement, except at street intersections and along a public park, without any provision therein limiting the tax to the benefits received by the property.

APPEAL from the County Court of Madison county;  
the Hon. WILLIAM P. EARLY, Judge, presiding.

J. H. & L. D. YAGER, for appellants.

JOHN F. MCGINNIS, and HENRY S. BAKER, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The county collector of Madison county applied for judgment against the lands and lots of appellants, which were returned to him delinquent as to a special tax levied by the city of Alton to macadamize and improve certain streets in said city and which had been confirmed by the judgment of the county court. Appellants appeared and filed objections, which were overruled and judgment was rendered against the premises.

This being a collateral proceeding, only such objections can be heard or considered as affect the jurisdiction of the county court to pronounce the judgment of confirmation. (*Steenberg v. People ex rel.* 164 Ill. 478; *People v. Colvin*, 165 id. 67; *People ex rel. v. Lingle*, id. 65.) The objections, therefore, to the proceedings in the county court, and the alleged failure of the court and the commissioners appointed by it to comply with the supposed requirements in making the assessment roll and confirming the assessment, will not be considered. The judgment of confirmation is binding and conclusive as against all such objections.

The only claim affecting the jurisdiction of the county court to hear and determine the questions involved in the assessment proceedings is, that the ordinance authorizing the improvement was void, so that it conferred no rights and no steps could be taken under it. Such an objection may be made in the collateral proceeding, and it is a good defense that a provision is without statutory authority and not within the power delegated to the city council, (*Culver v. People*, 161 Ill. 89,) or that the ordinance does not comply with a positive requirement of the statute necessary to make a valid enactment. (*Mansfield v. People*, 164 Ill. 611; *Cass v. People*, 166 id. 126.) The ground upon which the ordinance in this case is claimed to be void is, that it provides for a special tax upon contiguous property to pay the entire cost of the improvement, ex-

cept at street intersections and contiguous to a public park, without any provision limiting the tax to the benefits received by the property.

It is insisted that the amendment of 1895 to section 17 of article 9 of the City and Village act completely eliminated special taxation from the law of this State, and left only the law of special assessment to pay for local improvements. We do not understand that the amendment had that effect. It provided that no special tax should exceed the special benefit to the property taxed, and that the ordinance should not be deemed conclusive of such benefit, but the question should be subject to review and determination of the county court and be tried in the same manner as in proceedings by special assessment. Prior to this amendment, while the special tax was supposed to be based on an equivalent in benefits, the city council had a right to finally determine that question, and the imposition of the tax was such a determination which could not be disputed and was not subject to review. (*White v. People*, 94 Ill. 604; *Craw v. Village of Tolono*, 96 id. 255; *Enos v. City of Springfield*, 113 id. 65; *City of Galesburg v. Searles*, 114 id. 217; *City of Sterling v. Galt*, 117 id. 11; *Chicago and Northwestern Railway Co. v. Village of Elmhurst*, 165 id. 148.) The amendment merely changed this rule of law by providing that the ordinance should not be deemed conclusive of benefits, but that the land owner might, if dissatisfied, have that question submitted to the court and tried by a jury in the same manner as in proceedings by special assessment. It did not in any way affect or abridge the power of the city council in the enactment of the ordinance or require the introduction of any new provision to give it validity. The ordinance for the special tax was therefore not void, but was within the power conferred upon the city council and gave the court jurisdiction to enter the judgment of confirmation. The appellants did not avail themselves of the privilege extended to them by the amendment of

1895, and have the question of benefits reviewed and determined, and the judgment of the county court, which had jurisdiction, cannot be questioned in this collateral proceeding to collect the amount of the judgment.

The judgment will be affirmed.

*Judgment affirmed.*

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JACOB GLOS

v.

SAMUEL F. BOUTON.

*Opinion filed December 22, 1897.*

1. CLOUD ON TITLE—*jurisdictional elements necessary to maintain bill to remove cloud.* Under our statute a bill to remove cloud from title can be maintained only when the complainant is in possession of the premises, or where the premises are vacant and unoccupied at the time of the filing of the bill.

2. VARIANCE—*when variance between allegation and proof is fatal.* An allegation in a bill to remove cloud that the complainant is in possession of the premises is jurisdictional, and, when denied by answer, the variance between such allegation, and proof that the premises were in fact vacant, unfenced and unimproved when the bill was filed, is fatal.

3. PLEADING—*what is not an admission that complainant in bill to remove cloud is in possession.* An allegation in an answer to a bill to remove cloud that the defendant had begun an ejectment suit against the complainant, which was then pending, is not an admission that the complainant was in possession of the premises, as ejectment may be brought for unoccupied premises against one asserting title thereto.

APPEAL from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

ENOCH J. PRICE, for appellant:

In order to constitute a former action pending, so as to abate a second, it must appear that the prior action had been technically "commenced" when the latter action was instituted. 1 Ency. of Pl. & Pr. 754, 124.

The bill alleges possession in the complainant. This is a jurisdictional allegation, and is denied in the answer. The evidence is that the land is vacant, and that it has been in that condition for more than two years last past. Complainant having failed to prove his allegation of possession, his bill should have been dismissed. *Hardin v. Jones*, 86 Ill. 313; *Gage v. Abbott*, 99 id. 366; *Glos v. Randolph*, 133 id. 147; *Wetherell v. Eberle*, 123 id. 666; *Johnson v. Huling*, 127 id. 14.

EDWIN WHITE MOORE, and C. S. BOUTON, for appellee:

It is only necessary to make a *prima facie* case of ownership, as against a void tax deed, in a chancery proceeding, to remove such tax deed as a cloud. *Glos v. Randolph*, 138 Ill. 228.

There are only two cases under our law in which a party may file a bill to quiet title or to remove a cloud from the title to real property: First, when he is in possession of the lands; and second, when he claims to be the owner and the lands are unimproved and unoccupied. *Gage v. Abbott*, 96 Ill. 367; *Hardin v. Jones*, 86 id. 315.

Possession of land may be acquired and held by any use that clearly indicates an appropriation to the use of the person claiming to hold the property. *Truesdale v. Ford*, 37 Ill. 210.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is a bill filed on July 9, 1896, by the appellee claiming to be the owner of certain lots in Cook county, Illinois, for the purpose of having a tax deed held by the appellant removed therefrom as a cloud upon the appellee's title. Answer was filed, and reference was taken to a master in chancery, who made a report, finding that the appellee was entitled to the relief prayed for in his bill, and recommending that a decree be entered in accordance with the prayer of the bill. Exceptions were

filed to the master's report, but these exceptions were overruled, and the court rendered a decree, confirming the report and setting aside the tax deed as a cloud upon the complainant's title.

Numerous questions are discussed by counsel which we do not deem it necessary to notice. The decree must be reversed for the reasons hereinafter stated.

Under our statute a bill to remove a cloud from title can only be maintained in two cases, namely: Where the complainant is in possession of the premises, or where the premises are vacant and unoccupied at the time of the filing of the bill. (*Johnson v. Huling*, 127 Ill. 14; *Glos v. Randolph*, 133 id. 197). In the case at bar, the bill alleges that the complainant was in possession of the premises at the time of the filing of the bill. This allegation of possession is a jurisdictional one, and is denied in the answer. The proof furnished by the complainant himself shows that, when the present bill was filed, the lots in question were vacant. Charles Sherman Bouton, who was called as a witness, first for the complainant, and then for the defendant, testified as follows: "The property lies between Rhodes avenue and Woodland avenue and between Seventy-ninth and Eighty-first streets, and is vacant. It stands at present as open, unenclosed city lots, and has stood in that condition for two years past. It was in that condition at the time of filing this bill." If the bill had contained an averment that the premises were vacant and unoccupied, the testimony thus introduced would have sustained such averment. But there was no testimony whatever to sustain the allegation, that complainant was in possession of the premises when the bill was filed. The *allegata* and the *probata* must agree. Here, they do not agree; nor was any motion made by the complainant to amend his bill to make it conform to the testimony introduced.

In a plea filed by the defendant below, which was held by the court to be insufficient, the defendant set up in bar

of the present suit, that he had theretofore commenced a suit in ejectment against the complainant for the lands here in controversy, and that said ejectment suit was still pending. Although the defendant's plea was held insufficient, the court permitted the facts therein alleged to be set up in the answer. The fact, that such an ejectment suit was begun before the present bill was filed and was still pending when the bill was filed, is admitted; and it is also admitted, that no service had been had upon complainant in said ejectment suit when the present bill was filed. We pass no opinion upon the question as to what effect should be given to the pendency of the ejectment suit upon the present suit.

The ejectment suit is only referred to because of the conclusion drawn by appellee's counsel from its pendency. He claims, that the ejectment suit could only have been brought upon the theory that the present complainant was in possession of the premises; that, by bringing the ejectment suit, appellant admitted that appellee was in possession of the premises; and that, consequently, appellant is estopped from denying that the appellee was in possession of said premises when the present bill was filed. This position is not well taken, because the commencement of the ejectment suit was not necessarily an admission that the defendant therein was in possession of the premises in controversy. We have recently held, that an action of ejectment may be brought, under the statute of this State, where the premises are not occupied against a person claiming title thereto at the commencement of the suit. (*Converse v. Dunn*, 166 Ill. 25).

For the reason that the bill avers the complainant to be in possession, and the proof fails to sustain the averment of the jurisdictional fact of possession, the decree of the circuit court is reversed, and the cause is remanded to that court.

*Reversed and remanded.*



W. W. STEVENSON *et al.*

v.

JOHN BACHRACH.

*Opinion filed November 8, 1897.*

1. PARTITION—*premises owned in severalty are not subject to partition under the statute.* Premises belonging in severalty to two parties, and no portion thereof belonging jointly to both, are not subject to partition under the statute nor under any proceeding known in courts of equity. And this is true notwithstanding a single building covers both tracts.

2. DEEDS—*effect of deed where building covers two tracts of land owned in severalty.* Where a building covers two tracts of land owned in severalty, a deed to one of the tracts passes, as incident thereto, only the particular portion of the building standing thereon, in the absence of evidence as to the nature of the arrangement between the original owners who erected the building.

APPEAL from the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

This is a bill for partition, filed by appellee against the appellants, seeking partition of a house without asking for the partition of the land, upon which the house stands. Appellee owns the south half of lot 102 in James Allin's addition to Bloomington, except five feet off the east end thereof and five feet in width off of the south side thereof, the latter having been donated for an alley. One T. F. Worrell, now deceased, was the owner of a tract of land 9.5 feet in width, lying adjacent to the north line of the above described premises, owned by appellee. Worrell died testate, and by his will devised said 9.5 feet to his widow, C. A. Worrell, for her life, and, upon her death, to his daughter, Ida Harwood Worrell, and one W. W. Stevenson. Ida Harwood Worrell married W. D. Rudy, and died, leaving her son, Worrell Harwood Rudy, the latter being a minor. Said tract, 9.5 feet in width, is owned by W. W. Stevenson and W. H. Rudy, subject to the life estate of Mrs. C. A. Worrell; the interest of the minor Rudy being

also subject to the dower of his father. Some fifteen or twenty years ago Lucinda D. Luce, the wife of one Dr. Luce, owned said south half of lot 102, and one Hutchinson owned the south end of the north half of said lot 102. At this time Dr. Luce and Hutchinson erected a brick building, which is described by one of the witnesses as consisting of "a little brick and mortar and tin and such stuff." This building covered a strip of land, 9.5 feet wide, on the south end of the north half of lot 102, and also covered a strip, 10.6 feet wide, on the north end of the south half of lot 102. At this time Lucinda D. Luce owned in severalty said strip, which was 10.6 feet wide, and Hutchinson owned in severalty said strip, which was 9.5 feet wide. Lucinda D. Luce conveyed by warranty deed to one Maggie G. Alexander "the south half of lot 102 in James Allin's addition," etc. Thereafter Maggie Alexander and her husband, in consideration of \$3000.00, conveyed by warranty deed to John Dawson the said "south half of lot 102," etc. On November 19, 1894, John Dawson and wife, in consideration of \$3200.00 conveyed to the appellee, John Bachrach, "the south half of lot 102 in James Allin's addition to the city of Bloomington, except five feet in width off of the east end thereof and five feet in width off of the south end thereof." The title of Hutchinson to the south end of the north half of lot 102 became vested in T. F. Worrell. There appears in evidence a deed, dated May 14, 1887, executed by O. D. Dowley, administrator of the estate of Minerva Dowley, deceased, conveying to Thomas F. Worrell the following described real estate: "Commencing 48 feet south of the north-west corner of lot 102 of James Allin's addition, \* \* \* running thence east 59.5 feet, thence south 9.5 feet, thence west 59.5 feet, thence north 9.5 feet to the place of beginning." The property thus conveyed by the last named deed has become vested by the will aforesaid in said Stevenson and the minor, Rudy, subject to the life estate and the dower as aforesaid.

At the time the bill in this case was filed, appellee owned in severalty, under the deed from said Dawson, the tract of land, 10.6 feet wide, on the north end of the south half of lot 102, and appellants owned the tract of land, 9.5 feet wide, on the south end of the north half of lot 102, which adjoined and was adjacent to said tract of land, 10.6 feet wide, as above described. It thus appears, that appellee owned in severalty his tract of land, 10.6 feet wide, and the appellants owned in severalty their tract of land, 9.5 feet wide. The building in question covered the tract of land of appellee, 10.6 feet wide, and extended over and covered the tract of land 9.5 feet wide, owned by appellants, so that the building covered the whole 20.1 feet.

The bill avers, that the building, which is a one-story brick building, was erected by virtue of a license, granted by former owners of the above described lands, and that the appellee and the appellants are the owners in common of said building. The bill, however, admits and states, that the land is owned by the appellee and the appellants in severalty. The answer denies, that there was any agreement in regard to the erection of the building, and denies that it is owned in common by the appellee and the appellants, but claims that it is owned in severalty; that is to say, that appellee owns that portion of the building situated on his land, and the appellants own that portion of the building, situated on their land. On April 16, 1894, a verbal lease of the premises was made to one Burkhardt at \$15.00 per month. The rents paid by Burkhardt have been divided between appellee and appellants, \$8.00 to the former and \$7.00 to the latter.

The evidence does not show, that the house was erected by the former owners under any special agreement. It does not disclose the nature of the arrangement between the former owners, under which the building was constructed; but it clearly appears, that, if there was any arrangement, it was merely verbal, and not in writing.

The court below entertained the opinion, that the bill would lie for the partition of the house, irrespective of the land, and entered a decree in accordance with such opinion. This appeal is prosecuted from such decree.

EWING & WIGHT, and F. Y. HAMILTON, for appellants.

LIVINGSTON & BACH, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

When this bill for partition was filed, the premises were owned in severalty in the proportions of 10.6 feet thereof by the appellee and of 9.5 feet thereof by the appellants. It is a fact, and the appellee so admits in his testimony, that he only owns the land, 10.6 feet wide, described in his deed from Dawson, and that he only claims what is described in that deed and as it is therein described. So far as the building is concerned, it must be held that that portion of the building, which rests upon the portion of the land owned by appellee, belongs in severalty to him, and that portion of the building, which rests upon the land belonging to appellants, belongs in severalty to them, in the absence of any testimony as to the nature of the arrangement between the original owners, who erected the building. "The grant of a tract of land passes everything standing upon the land. \* \* \* A deed to land conveys the buildings thereon. Evidence of the intention of the grantor is inadmissible." (2 Devlin on Deeds, sec. 863). By the delivery of the deed, which was executed by Dawson to appellee, the grantor therein conveyed to appellee, not only the land, but the portion of the building upon the land. "*Cujus est solum, ejus est usque ad cælum.*" Lord Coke says, that the word, "land," in its legal signification, comprehends any ground, soil, or earth whatever, and it also has an indefinite extent upwards as well as downward; and that, therefore, it includes all castles, houses and other build-

ings standing thereon. (*Isham v. Morgan*, 9 Conn. 374.) It is also true, that, by the delivery to Worrell of the deed which conveyed to him his land, the portion of the building resting thereon passed with the land. But it cannot be said, that, by the deed which was executed to appellee and by the deed which was executed to Worrell, any building, or any portion of any building not standing upon the particular premises conveyed by these deeds respectively, passed thereby to the grantees therein. It follows, that appellee acquired no interest by his deed in the portion of the building which rested upon Worrell's land, and Worrell by his deed acquired no interest in the portion of the building which rested upon the land of appellee. The portions of the land, upon which the building stood, were not only owned in severalty by the parties, but the portions of the building, resting respectively upon the portions of the land owned in severalty, were also owned in severalty. We are unable to understand how it can be contended, under these facts, that the appellee and the appellants owned the building in common, or were tenants in common thereof.

In the case at bar, therefore, an attempt is made by the appellee, the complainant below, to accomplish the partition, by an involuntary proceeding, of property owned in severalty. This cannot be done under the Partition act of this State, and under the construction, which has been given by this court to that act. Section 1 of the Partition act provides, "that when land, tenements or hereditaments are held in joint tenancy, tenancy in common or co-parcenary, \* \* \* any one or more of the persons interested therein may compel a partition thereof by bill in chancery," etc. (3 Starr & Cur. Stat.—2d ed.—p. 2912). In *McConnel v. Kibbe*, 43 Ill. 12, we held that an estate must be held jointly, in common, or in co-parcenary, in order to be the subject of partition under our statute; and that premises, belonging in severalty to two, and no portion thereof belonging jointly to both, are not

subject to partition under our statute, or under any proceeding known in courts of equity.

We are, therefore, of the opinion, that such a bill for partition, as has been filed in this case, will not lie, and that the court below erred in entering the decree for partition. Accordingly, the decree of the circuit court is reversed, and the cause is remanded to that court with directions to dismiss the bill.

*Reversed and remanded.*

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THE FIREMEN'S INSURANCE COMPANY

v.

LILLIE HORTON.

*Opinion filed December 22, 1897.*

1. **PRINCIPAL AND AGENT**—*whether party soliciting insurance was the agent of the company is a question of fact.* In a suit to recover on a fire policy, the question whether the party who solicited the insurance and procured the policy was the agent of the insurance company is a question of fact for the jury, which is conclusively settled by the Appellate Court's judgment of affirmance.

2. **INSURANCE**—*when notice to agent will be imputed to company and operate as a waiver.* A provision in a fire policy that the existence of an incumbrance upon the property would invalidate the policy unless the fact was made known to the company and expressed in the policy, is waived where the agent was notified of the incumbrance when soliciting the insurance, but failed to disclose the fact to the company or have it expressed in the policy.

*Firemen's Ins. Co. v. Horton*, 68 Ill. App. 497, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

This was an action instituted in the circuit court of Cook county by Lillie Horton, to recover from the Firemen's Insurance Company for a loss sustained by her in

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the destruction by fire of certain household goods on November 25, 1893. The declaration contained two counts, to which the general issue was filed, together with notice by the defendant of thirty-eight special matters which it would offer in defense.

Appellee held a policy issued by the Firemen's Insurance Company upon her property, which was solicited from her by one Charles S. Smith. At the time the policy was issued there was a chattel mortgage upon a portion of the household goods for \$81.60, but a part having been paid thereon, the amount due at the time of the fire was about \$50, which still stood unreleased of record. That portion of the property which was encumbered by the mortgage had cost about \$250. The policy of insurance held by the plaintiff provided: "If the interest of the assured in the property be otherwise than an absolute fee simple title, or if any other person or persons have any interest whatever in the property described, whether it be real estate or personal property, or if the building insured or containing the property insured by this policy stands on leased ground, or if there be a mortgage or other encumbrance thereon, whether inquired about or not, it must be so represented to the company and so expressed in the written part of this policy, otherwise the policy shall be void." The fact of the existence of this mortgage was made known to Smith, who solicited the insurance, but no mention was made by him of it in the application or policy. It was a controverted question of fact whether Smith was the agent of the appellant.

Upon a trial in the circuit court of Cook county the jury returned a verdict against appellant for the sum of \$1522.95, upon which judgment was rendered, and on appeal to the Appellate Court this judgment was affirmed. From this judgment of affirmance this appeal is prosecuted.

U. P. SMITH, and WILLIAM J. AMMEN, for appellant.



MOSES, ROSENTHAL & KENNEDY, for appellee.

Mr. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

The particular ground of defense relied upon by appellant in this case as reason why appellee is not entitled to recover under her policy for the loss of the property destroyed by fire is, that at the time the application for insurance was made and the policy issued there was a chattel mortgage on a portion of the furniture, no mention of which was made in the application, nor was such fact disclosed in any manner, unless it was to Smith, the party who solicited the insurance and delivered to her the policy.

Under one of the conditions of the policy it is provided that if there be a mortgage or other incumbrance on the property, whether inquired about or not, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy should be void. Smith, who solicited the insurance from appellee in this case, was informed, at the time the application was made, there was a mortgage on a small portion of the furniture. It is contended, however, Smith was not the agent of the appellant, and therefore notice to him was not binding upon the company. The question as to whether or not Smith was the agent of the appellant company was one of fact, and was an issue before the jury in the trial court. He solicited the insurance from appellee, took her application in the appellant company, and in a few days returned to her the policy in question, for which she paid a premium of \$25. She saw no one in connection with the transaction or the delivery of the policy to her except Smith. In an affidavit presented by appellant on the trial of this case it was stated "it expected to prove by Charles E. Smith, acting as agent of said company in obtaining the policy of insurance sued on in this case," that appellee made certain statements,



etc. There being evidence tending to establish the fact that Smith represented the appellant company, and no motion having been made at the close of plaintiff's testimony to instruct the jury to find for the defendant, it was proper for the court to submit to the jury, as one of the issues of fact in the case, whether Smith was an agent of the appellant company. This fact having been settled by the verdict of the jury and the judgments of the trial and Appellate Courts, it follows we must consider the case on that basis.

Where the insured in a fire insurance company makes statements to the agent of the company who solicits the insurance, of facts which might, under the terms and conditions of the policy, avoid it if omitted, and the agent does not state such facts, the insured will be as fully protected as though such facts or conditions had been noted in the application or the policy. In other words, notice to an agent of an insurance company of facts which might otherwise avoid the policy will be considered as notice to the company and as having been waived by the company. (*Home Ins. Co. of New York v. Mendenhall*, 164 Ill. 458, and cases cited.) It follows, therefore, that the question of fact having been established Smith was the agent or was acting for the appellant company, and he having been notified of the fact that the chattel mortgage was in existence on a portion of the property insured, appellant could not take advantage of the clause in the policy before referred to, and avoid payment on that account.

There was no error in the admission or exclusion of evidence or in the instructions given by the trial court to the jury.

The judgment of the Appellate Court must be affirmed.

*Judgment affirmed.*

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v.

THE MINNIE CREEK DRAINAGE DISTRICT.

*Opinion filed December 22, 1897.*

DRAINAGE—commissioners cannot create indebtedness in advance and levy assessment to meet it. Drainage commissioners have no power to create in advance an indebtedness for completing the improvement and then levy an assessment to meet it, even though they advanced the money to complete the work after the original assessment was exhausted. (*Winkelman v. Moredock and Ivy Landing Drainage District*, ante, p. 37, followed.)

APPEAL from the County Court of Kankakee county; the Hon. JOHN SMALL, Judge, presiding.

W. R. HUNTER, for appellants.

PADDOCK & COOPER, for appellee.

Per CURIAM: This is an appeal by certain owners of lands in the Minnie Creek drainage district, and by the commissioners of highways of the town of Otto, from the order and judgment of the county court of Kankakee county confirming a special assessment against their respective tracts of land. The drainage district was organized in 1893, under the act of May 29, 1879, and the acts amending the same, for drainage purposes, and there was levied at that time an assessment against the lands in the district, which has been collected and expended. This was a petition filed in 1895 by the drainage commissioners for a "re-assessment" of all the lands in the district. The petition alleged that the previous assessment to the amount of \$9281.95 had been expended in and about the work of the district, under the direction and approval of the county court, as shown by an itemized statement attached to the petition, and that there remained but \$28.35 in the treasury of the district, and that there were exist-

ing outstanding liabilities and obligations of the district to the amount of \$4727.66, which were incurred for money expended in pursuance of the original plans and specifications, as approved and ordered by the court, and that such expenditures had been approved by the court; that there was a mistake in the original estimate, and the work cost nearly \$5000 in excess thereof, and the money for such excess had been advanced by the commissioners to save the district from the costs of litigation and from suits by contractors. The petition alleged that the previous assessment was wholly inadequate to complete the work commenced, which work was necessary to insure protection of the lands in the district; that the commissioners desired to have money for additional work, to-wit, to form a fund to repair and clean out ditches and remove obstructions and the natural filling up of the ditches for the next two or three years, estimated at \$700, and that \$572.34 would be required to complete the work already commenced. The petition prayed for a re-assessment to the amount of \$6000, which amount was the aggregate of the two items of \$700 and \$572.34 and the outstanding indebtedness of \$4727.66. No one appearing to object to the said petition after due notice, a default was entered and the assessment ordered as prayed to be made by the commissioners. Afterwards appellants appeared, in pursuance of notice given of the application of the commissioners for confirmation of the assessment, and filed their objections to such confirmation, in which, among other things, it was alleged that the order authorizing the assessment was void and the commissioners had no authority to make the assessment; that the commissioners had no authority to contract debts and then make assessments on the lands in the district to pay such debts, and could not lawfully make an assessment to reimburse themselves for moneys advanced by them to carry on the work, in excess of the assessment which had been made for such work. A jury was waived and cause heard by the court.

The objections were overruled by the court. Motions were also made to modify the order directing the assessment, so as to exclude from such assessment so much thereof as was required to pay the alleged liabilities of the district, and to eliminate from the assessment, so far as it applied to the lands of the objectors, the alleged illegal assessment of \$4727.66 levied to pay the alleged liabilities and outstanding obligations of the district. Exceptions were taken to the action of the court in overruling the objections and motions of the objectors and to the judgment of the court in confirming the assessment.

We are of the opinion that the county court erred in not sustaining appellants' objections. The commissioners had no power to incur an indebtedness against the district in excess of the assessment levied. This power is limited by the statute, and the court had no power to authorize them to incur an indebtedness not authorized by the statute. As said in the recent case of *Winkelmann v. Moredock and Ivy Landing Drainage District*, (ante, p. 37): "The commissioners have no power to create the indebtedness in advance, and then levy an assessment for the purpose of meeting it." The question was fully considered in that case, and the conclusion was reached as stated. No necessity is seen for a further review of the question in this case.

However unselfish commissioners may be in advancing or borrowing money or in creating debts in excess of the assessments to complete or carry on the work of reclaiming the lands in the district, it is an assumption of power not conferred to do so and then to cause an assessment to be levied to reimburse themselves or to pay the indebtedness thus created. As was said in the case cited, the statute limits the power of the commissioners to borrow money to a certain percentage of the amount of the then unpaid assessment. "Necessarily, therefore, the assessment precedes the contracting of the indebtedness." While some hardship may result in this case, it would

open the door to the grossest abuses in other cases to sustain the assessment, as against the lands of the appellants, in this case.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

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PASCAL SAMUELL

v. .

THE TOWN OF SHERMAN.

*Opinion filed November 8, 1897—Rehearing denied December 9, 1897.*

1. PARTIES—*right of party to maintain an action in name of town to enforce penalty for obstructing highway.* One who, under section 74 of the Road and Bridge act, seeks to enforce before a justice a penalty against another for obstructing a highway, the highway commissioners having failed to act seasonably, and who has given the required bond for costs, is entitled, on appeal to the circuit court, to have the town substituted in his place as plaintiff.

2. PRACTICE—*when highway commissioners cannot dismiss suit to enforce penalty for obstructing road.* Where, on appeal to the circuit court from an action brought before a justice by one party to enforce against another a penalty for obstructing a highway, the highway commissioners having failed to act seasonably, the town is substituted as plaintiff, the commissioners cannot have the suit dismissed without the consent of the complaining party.

WRIT OF ERROR to the Circuit Court of Mason county; the Hon. GEORGE W. HERDMAN, Judge, presiding.

This was a suit originally commenced before a justice of the peace by George Athey, for and on behalf of the town of Sherman, against Pascal Samuell, under section 74 of the Road and Bridge act, to recover a fine, under the provisions of section 71 of the same act, for maintaining an alleged obstruction in a public highway in said town. The highway commissioners of the town, though complaint had been repeatedly made to them by Athey, refused to take any action in the matter, claiming that the alleged obstruction was not in the public highway.

However, they finally made an agreement in writing with Athey, setting forth that they were reluctant to give said notice for the reason that it would lay them liable to prosecute said case further, and that Athey thereby agreed that in consideration of the giving of the desired notice by the highway commissioners, he, Athey, would make no further complaints to them about the obstructions. The following is a copy of the notice served on Samuell:

"You are hereby notified that there are obstructions in the public road across the land of which you are the owner, at the south-east corner of the angle where the road coming from the north at the residence of George W. Athey, near the south-west corner of the town of Easton, Illinois, turns west, immediately in front of said residence, and extending from said angle north-west toward the Illinois Central railroad. You are hereby notified that said road is sixty-six feet wide, and runs in a straight line from said railroad squarely up to the yard fence of the said residence of George W. Athey. And you are hereby notified to remove from the said road all obstructions, and especially those near said residence, and consisting of buildings, fences, wagons, vehicles, farm implements and machinery, header barges, hay frames and rubbish, trash, etc., and unless you remove such obstructions from said road within ten days from the date of service of this notice, you will be proceeded against according to law."

A trial was had before the justice, and he rendered judgment for defendant. On appeal to the circuit court of Mason county a trial was had, and the jury found defendant guilty and assessed the penalty at \$35 and costs.

Before the trial in the circuit court, on motion of Athey, the town of Sherman was substituted as plaintiff. The highway commissioners then entered a motion to dismiss the suit, which motion was overruled by the court.

I. R. BROWN, for plaintiff in error.

DEPUE & NORTRUP, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

Two questions are first raised in this case by plaintiff in error, having reference to the procedure in the court below. One is, that the circuit court erred in sustaining the motion to substitute the town of Sherman as plaintiff in lieu of Athey, in whose name the suit had first been brought, without imposing any terms as a condition to the allowance of the motion, as required by section 24 of the Practice act. The other is, that the court erred in refusing to allow the suit to be dismissed at the motion of the highway commissioners.

Section 74 of the Road and Bridge act provides that "it shall be the duty of the commissioners to seasonably prosecute for all fines and penalties under this act, but in case of failure of said officers to so prosecute, complaint may be made by any person, provided said person shall, before bringing suit in the name of the town, give a bond for costs, as is provided for in cases of non-resident." Athey having given the bond required by this section, there was no error in the rulings of the trial court on these two motions. He had a right to have the suit tried, and the statute fixed the terms on which he could use the name of the town.

The main contention, however, is, that the verdict is contrary to the evidence, and that it is the result of prejudice. The notice served on the plaintiff in error recites that there are obstructions "at the south-east corner of the angle where the road coming from the north at the residence of George W. Athey, near the south-west corner of the town of Easton, Illinois, turns west," and also "that said road is sixty-six feet wide, and runs in a straight line from said railroad squarely up to the yard fence of said residence of George W. Athey." The testimony shows that the obstructions are on the east half of the sixty-six feet claimed as a road in the notice. It is contended by



plaintiff below that this road was originally laid out by the commissioners in 1862, of the width of four rods, or sixty-six feet, and that these obstructions are clearly within the boundaries of the road as laid out. The order laying out the road declares it to be "a public road four rods wide, the line of the said survey being the center of the said road." As far as this portion of the road is concerned, the line of the survey followed the section line between sections 35, 36, 25 and 26. The testimony shows that between sections 25 and 26 there was in 1862, and still is, a hedge fence, which fence was, prior to a re-survey made in 1870, supposed to be on the section line, but by said re-survey the line was shown to be about three rods west of the hedge fence. But the road as laid out by the commissioners lay for only two rods in width east of the section line, and these alleged obstructions were not within these two rods, but were located east of their east line, so they could not possibly be in the road as laid out, whether the old section line as indicated by the hedge was taken as the center of the road, or the new section line as established by the re-survey of 1870.

It is one of the contentions of plaintiff in error that this road as laid out was never opened as required by the statute; that the hedge fence has always remained in the middle of the road, and that because of such failure to open there was not, by virtue of the laying out of such road by the commissioners, any public road to be obstructed. However this may be, it is plain from the evidence that the section line was the center of this part of the road as laid out, but there was never any travel on the west side of the hedge fence, so that by virtue of the proceedings laying out the road there could not have been more than two rods in width of the road east of the hedge fence, and regarding the section line, as established by the re-survey, as lying three rods west of the hedge fence, the whole of the road as laid out was, so far as the record was concerned, established west of the hedge



fence, so that whether the road was in fact opened or not, the obstructions complained of were not in any part of the road as laid out.

But it is contended by defendant in error that the highway must be regarded as having been laid out and established for its full width of sixty-six feet on the east side of the hedge fence, and in this connection it is contended that it was so used and traveled by the public since then, until part of the same was closed up where it ran around the five-acre tract, and until plaintiff in error obstructed that part of the road now in controversy, and that the road may be regarded as a public highway by dedication or prescription. But we fail to find in the record any sufficient evidence of any dedication to or acceptance by the public, or of any prescriptive use by the public of that part of the alleged road occupied by the obstructions complained of. If the strip of land encumbered by the obstructions was a part of the public highway as laid out, dedicated or continuously used by the public, so also was the land occupied by Athey's house, which was located just south of the obstructions in question and directly within what would be the public highway according to the contentions of defendant in error. It is true, of course, that as to that part of the alleged original road now occupied by Athey's house and obstructed by fences enclosing the same no question is made in this case. But the closing up of that part of the road has, we think, some bearing upon the question as to whether or not there was a public road at the place alleged to have been obstructed, by dedication or prescription. It does not appear from the evidence that that part of the alleged road obstructed was ever used by the public.

It seems to be contended, also, by defendant in error, that because J. M. Samuell, a former owner, laid out the village of Easton in the south-west quarter of section 25 and north of that part of the alleged highway obstructed, and platted and dedicated a street of said village sixty-

six feet wide on the west side of the village, and which street was located directly upon this alleged highway, having for its western boundary the said hedge fence, that thereby the alleged highway sixty-six feet wide and located immediately east of the hedge fence was recognized, and the land was thereby dedicated to the public use as a highway. But we are unable to see how the platting of a street upon that part of the alleged highway could operate as a dedication of another part of the same strip of land if extended south, lying several rods south of the end of the street and of the village limits.

Nor are we able to find in the record any evidence from which an estoppel could arise against plaintiff in error. That part of the road which seems to have run through the piece of land now occupied by Athey belonged to Samuell when the road was laid out, and it seems to have been closed up in 1873 by the land owners, and the road changed, and made to turn to the west just south of the section line. This action seems to have been acquiesced in by the public, and there is no evidence that this part of the road was vacated by the public authorities. Samuell did not sell off the land occupied by Athey's house until after the change had been made, and we do not find in the record any evidence that in selling the land he made any representations that that part of the alleged public highway north of the Athey piece, and where the alleged obstructions now are, was a part of the public highway, so as to give rise to an estoppel. The line of travel was always west of the alleged obstructions, and obstructions, in some form, have been on the strip in question, or a part of it, since 1874, when a fence was placed there by Samuell.

We are unable to find in the record any sufficient evidence to authorize the jury to find that the said alleged obstructions were in the public highway. The judgment is reversed and the cause remanded.

*Reversed and remanded.*

LYDIA H. WHITSON

v.

PARKER GROSVENOR.

*Opinion filed December 22, 1897.*

1. CONVEYANCES—*when statute operates to transfer grantor's after-acquired title to grantee.* Section 7 of the Conveyance act (Rev. Stat. 1874, p. 273,) operates to transfer the grantor's after-acquired title to the grantee only when the grantor has, by covenants in his deed, warranted his ownership and right to convey the title, while in fact he did not have the title, but acquired it after making the deed.

2. SAME—*grantor and his heirs estopped to assert after-acquired title.* Where a grantor not having title to property has warranted his ownership and right to convey by covenants in his deed, both he and his heirs are estopped to assert a title to such property acquired by him after making the deed, as such title vests at once, by operation of law, in the grantee.

3. SAME—*interest acquired by heirs by descent, after grantor's death, is not transferred as "after-acquired title."* Where a mother, son and daughter each own an undivided interest in land, and the daughter conveys her interest to the son by warranty deed and dies leaving heirs, upon the subsequent death of the mother, intestate, one-half of her interest descends to the heirs of the daughter, and does not pass to the son, under the daughter's deed, as after-acquired title.

WRIT OF ERROR to the Circuit Court of Jackson county;  
the Hon. JOSEPH P. ROBARTS, Judge, presiding.

This is a writ of error prosecuted to review a decree of the Jackson circuit court sustaining a demurrer to a bill in chancery filed by plaintiff in error and other complainants against defendant in error, and dismissing the bill at cost of the complainants.

The bill alleges: "That on, to-wit, the . . . th day of . . . . ., A. D. 1847, John Grosvenor, theretofore and then a resident of said county of Jackson, died at his home therein, intestate, seized and possessed of the north-west quarter and the north-west quarter of the south-west quarter of section 30, township 8, south, range 4, west of the third principal meridian, in said county; that at his

death he left him surviving, as his widow, Agnes Grosvenor, and as his children and only heirs-at-law, Parker Grosvenor, Mary Crain (formerly Mary Grosvenor) and Martha Grosvenor, to whom his real estate, subject to the dower right and estate of the said Agnes Grosvenor therein, descended in equal parts, each of them being entitled to one undivided one-third; that the dower interest of said Agnes Grosvenor in said lands was never assigned, though she continued for some considerable time, the exact duration of which your orators cannot now state, to occupy the same, and subsequently, and on, to-wit, the 19th day of July, A. D. 1849, intermarried with one Peter Kiefer, after which, though the exact date is to your orators unknown, she removed with him to DeSoto, in said county, where they two continued to reside until the date of her death, as hereinafter alleged; that subsequent to the death of said John Grosvenor, and on, to-wit, the first day of March, A. D. 1857, the said Martha Grosvenor died intestate, without issue, she having never been married, whereby her one-third interest in said lands (there having never been any division or partition of said lands among the said heirs of the said John Grosvenor) descended in unequal parts to her mother, the said Agnes Kiefer, (*nee* Grosvenor,) her brother, Parker Grosvenor, and her said sister, Mary Crain, the said Agnes taking two shares, equal to one undivided sixth of all said lands, and the said Parker and Mary each taking one share or part, equal to one undivided one-twelfth part of the whole of said lands; that subsequent to the death of said Martha, and on, to-wit, the first day of February, A. D. 1861, the said Mary Crain, together with Willis Crain, her husband, by her deed of that date, of warranty as to herself and husband only, the said deed containing no covenant that her heirs should warrant the title conveyed thereby, conveyed all her then interest in said lands, in said deed professing to convey an undivided half thereof to her brother, the said Parker Grosvenor, and subse-

quently, and on, to-wit, the....th day of....., A. D. 18...., died at said county intestate, leaving surviving her as her husband the said Willis Crain, and as her children and only heirs-at-law your orators, Ida May Ward, Lydia H. Whitson, Halleck Crain and Albert Crain, but left no estate, property or effects, of any character, to descend to her heirs; that subsequent to the death of said Mary Crain, and on, to-wit, the 27th day of March, A. D. 1891, the said Agnes Kiefer died at said county of Jackson intestate, whereby her undivided one-sixth part of said lands so as aforesaid inherited from the said Martha Grosvenor descended to her said son, Parker Grosvenor, and to your said orators, Ida May Ward, Lydia H. Whitson, Halleck Crain and Albert Crain, her grandchildren, so that he, the said Parker Grosvenor, is now the owner of an undivided eleven-twelfths of all of said lands, and your orators are the owners, jointly and together, of the remaining one-twelfth thereof, the share of each of them in the same being equal to one undivided forty-eighth part of the whole of said lands; that although the said Parker Grosvenor and your orators are all and each adults, yet he and they have not been able to come to any amicable agreement for a division or partition of said lands, and that no such division or partition has ever been made, nor have any proceedings at law or in equity ever been had or instituted for such division or partition."

The bill further alleges that defendant, Grosvenor, ever since the abandonment of the premises by Agnes Kiefer, has been and yet is in the sole and exclusive possession of said lands and premises and in the enjoyment of the rents and profits, which have uniformly and from year to year been of great value, to-wit, the clear yearly value of \$600, yet he has never accounted to complainants, or any of them, for their or his or her just or equal share of such rents and profits, and concludes with the usual prayer for account and partition, and for process.

S. W. TREESH, and R. J. STEPHENS, for plaintiff in error.

HILL & MARTIN, for defendant in error.

Mr. JUSTICE BOGGS delivered the opinion of the court:

It is urged as ground of demurrer that it appears from the face of the bill the defendant had had the sole and exclusive possession of the land therein described for a period of twenty years prior to the filing of the bill, and therefore the right of action of complainants, if any they ever had, was barred by the Statute of Limitations. We need not pause to consider whether the possession of the defendant, as alleged in the bill, was such in its nature and character as would avail to set the Statute of Limitations in operation against a co-tenant, for the reason it does not appear from the allegations of the bill when the defendant entered into such possession nor how long he has held the same. It is true, the bill states, as counsel for defendant in their argument insist, that the defendant went into possession when Mrs. Kiefer abandoned the premises and moved to DeSoto, but the date of such removal does not appear. The averments of the bill relied upon by the defendant to support this insistence are as follows: "That the dower interest of said Agnes Grosvenor in said lands was never assigned, though she continued for some considerable time, the exact duration of which your orators cannot now state, to occupy the same, and subsequently, and on, to-wit, the 19th day of July, A. D. 1849, intermarried with one Peter Kiefer, after which, though the exact date is to your orators unknown, she removed with him to DeSoto, in said county, where they two continued to reside until the date of her death, as hereinafter alleged." It will be observed the statement is expressly made that "the exact date" of the removal of Mr. and Mrs. Kiefer from the land is unknown to the complainants. The court could not determine



from the face of the bill when the defendant succeeded to the possession of the land, and therefore could not properly rule it appeared the right of complainants to be heard had been barred by the efflux of time.

The remaining ground of demurrer relied upon by counsel for defendant in error is, that the execution and delivery of the warranty deed by Mrs. Crain, mother of the complainants, to the defendant, estopped Mrs. Crain from afterwards asserting an adverse title, or that, by operation of the provisions of section 7, chapter 30, of the Revised Statutes, any title subsequently acquired enured at once to her grantee, the defendant in the bill, and the further contention of defendant in error the provisions of the statute or the rule of estoppel acted with like effect upon any title after-acquired by the complainants, they being children and heirs-at-law of said Mrs. Crain, the grantor.

It is not necessary, in order to correctly determine the contention, we should consider the point urged by counsel for plaintiffs in error that, said grantor being at the time of the execution of the deed a *feme covert*, had no power, under the then existing law as to the rights of married women, to legally bind herself by a covenant; or the other point, also urged by the same counsel, that it appears from the statement of the bill the covenant was so qualified and limited that it was the personal undertaking of the grantor alone, and was not, and did not purport to be, obligatory upon her heirs, for the reason it clearly appears the grantor, Mrs. Crain, did not, at any time after the execution of the deed, acquire any interest or title in the land, nor did the complainants, her children, inherit from her any such title or interest or any property or effects whatever. She died insolvent and before the death of her mother, Mrs. Kiefer. When she executed the deed she owned an undivided five-twelfths interest in the land. Her brother, the defendant, also owned an undivided five-twelfths, and Mrs. Kiefer owned

the remainder, being an undivided two-twelfths in fee, and also a dower interest in the entire premises. It appeared from the bill Mrs. Kiefer retained the title to the two-twelfths interest until her death, which occurred in 1891. She died intestate, and the title possessed by her descended, under the first clause of section 1, chapter 39, of the Revised Statutes, entitled "Descent," one-half to her son, Parker, the defendant in error, and the other half to the plaintiffs in error, her grandchildren, in common.

No argument is necessary to support the assertion the title possessed by Mrs. Kiefer in the premises during her lifetime was in nowise affected by the covenant in the deed executed by Mrs. Crain. Such title, wholly unaffected by such covenant, remained in Mrs. Kiefer, and passed at her death to those designated by the statute to take such title as her heirs. Had Mrs. Crain survived her mother, Mrs. Kiefer, and acquired title by descent from her after the execution of the deed, a question would have arisen whether such title enured at once, under the statute, to the defendant in error because of the covenants of warranty in the deed, or whether Mrs. Crain would have been deemed estopped from asserting it as adverse to that which she covenanted to convey and warrant by her deed.

The statutory provision on the rule of estoppel sought to be invoked by defendant in error in support of the decree sustaining the demurrer is not applicable to the state of case disclosed by the bill. The statute is as follows:

"Sec. 7. If any person shall sell and convey to another, by deed or conveyance purporting to convey, an estate in fee simple absolute in any tract of land or real estate lying and being in this State, not then being possessed of the legal estate or interest therein at the time of the sale and conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate to the land or real estate so sold and con-



veyed, it shall be taken and held to be in trust and for the use of the grantee or vendee; and the conveyance aforesaid shall be held and taken, and shall be as valid, as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance."

It has application only when a grantor who, by covenants in a deed, has warranted he is the owner and has the right to convey the title to the premises he purports to convey, had not such title but afterwards acquires it, in which case the statute operates to transfer such after-acquired title to the grantee in the deed with the same effect as if the grantor had been possessed of the after-acquired title at the time of the execution of the deed. The rule of estoppel denies such grantor the right to assert such after-acquired title. And it is also true the heirs of such grantor would take no interest in the title so afterwards acquired by their ancestor, for the reason such title would not remain in him to descend to any one, but by operation of law would vest at once in his grantee. But in the case at bar the grantor did not afterwards succeed to any further title in the premises than that possessed when the deed was executed. The complainants do not claim any interest in the premises by, through or under such grantor, but from an entirely distinct and independent source.

It does not appear from the allegations of the bill the plaintiffs were estopped to assert the title derived by them from their grandmother, Mrs. Kiefer, or that the statute hereinbefore referred to had any potency to divest them of such title. The demurrer should have been overruled.

The decree must be and is reversed and the cause remanded.

*Reversed and remanded.*

WARREN COLE *et al.*

v.

JAMES McLAUGHLIN.

*Opinion filed December 22, 1897.*

**EJECTMENT**—*ejectment judgment should follow the verdict.* A general ejectment judgment that the plaintiff recover possession of the whole of the premises described in the declaration is erroneous, where the verdict is special, authorizing the plaintiff to recover a part, only, of the premises described.

WRIT OF ERROR to the Circuit Court of Cook county;  
the Hon. EDMUND W. BURKE, Judge, presiding.

EDWARD ROBY, for plaintiffs in error.

P. McHUGH, for defendant in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is an action of ejectment, brought by the defendant in error against the plaintiffs in error. The premises are described in the declaration, as lot 12, in block 71, in the subdivision of sections 5 and 6, township 37, north, range 15, east.

The verdict rendered by the jury is as follows: "We, the jury, find the defendants guilty of unlawfully withholding from the plaintiff the possession of the premises described as follows: Commencing at the south-east corner of the brick building known as No. 9144 Commercial avenue in Chicago, Cook county, Illinois; thence north two feet and one-quarter of an inch to the north line of said lot 12, in said declaration described; thence west, on the north line of said lot, eighty-five feet, to the west line of the west wall of said brick building; thence south one foot nine inches and seven-eighths of an inch, to the south line of the south wall of said brick building; and thence east, along the south line of the south wall of said

building, so as to include any chimney projection on the south side of said wall, to the place of beginning; the same being part of the premises described in the plaintiff's declaration; and the right to possession to the property in question is in the plaintiff in fee simple."

The judgment rendered by the court is as follows: "This cause coming on to be heard upon the defendant's motion for a new trial, after arguments of counsel and due deliberation by the court said motion is overruled and a new trial denied. Therefore, it is considered by the court that the plaintiff do have and recover of and from the defendants the possession, in fee simple, of that certain parcel or tract of land, with the appurtenances thereon belonging, situate in the city of Chicago, county of Cook and State of Illinois, known, designated and described as follows, to-wit: Lot 12, in block 71, in the subdivision of sections 5 and 6, township 37, north, range 15, east of 3d P. M., and that a writ of possession do issue therefor, and that the plaintiff do have and recover of and from the defendants his costs and charges in this behalf expended, and have execution therefor."

This judgment is erroneous. The verdict is a special verdict, finding that the defendants are guilty of unlawfully withholding from the plaintiff the possession of a part of the premises described in the declaration. The judgment, however, is a judgment that the plaintiffs recover from the defendants the possession of the whole of the premises described in the declaration. In other words, the judgment is a general judgment for all of the premises, while the verdict is a special verdict for a part of the premises.

The fifth paragraph of section 30 of the Ejectment act provides that, "if the verdict be for a part of the premises described in such declaration, the verdict shall particularly specify such part, as the same shall have been proved, with the same certainty hereinbefore required in the description of the premises claimed." (1 Starr & Cur.

Ann. Stat. p. 987). Section 32 of the same act provides, that "in cases where no other provision is made, the judgment in the action, if the plaintiff prevail, shall be, that the plaintiff recover the possession of the premises, according to the verdict of the jury, if there was such verdict," etc. It is manifest that, here, the judgment is not, that the plaintiff recover the possession of the premises according to the verdict of the jury, the verdict of the jury being for a part of the premises and the judgment being for the whole of the premises.

"The judgment in the action of ejectment should follow the verdict as a matter of course." (7 Ency. of Pl. & Pr. p. 349, and cases cited; *City of East St. Louis v. Hackett*, 85 Ill. 382; *Mapes v. Scott*, 94 id. 379).

Tyler, in his work on Ejectment, at page 584, says: "If the verdict, in the action of ejectment, is in favor of the plaintiff, for the premises in the declaration described, in general terms; the entry of the judgment is, that the plaintiff recover his term against the defendant, of and in the premises aforesaid. \* \* \* But when the verdict is in favor of the plaintiff for a part only of the premises claimed in the declaration, and in favor of the defendant for the residue, the judgment is, that the plaintiff recover possession of the part found for him by the verdict; and as to the other part, that the defendants go thereof without day."

In *Marmaduke v. Tenant's Heirs*, 4 B. Mon. 210, the jury found the defendant guilty as to five-sevenths of the tract involved, and the court said: "The judgment is for the whole tract and is, therefore, as has been repeatedly decided by this court, unauthorized and erroneous."

In *Meraman's Heirs v. Caldwell's Heirs*, 8 B. Mon. 32, it is said: "The verdict finds the defendants guilty as to eleven out of thirteen parts of the land, \* \* \* and the judgment is general, that the plaintiffs, the said children of L. Caldwell, recover their term, etc. In this, the judgment is erroneous. It should have followed the ver-

dict in designating the extent of the interest recovered by describing it as eleven-thirteenths of the premises, etc., or in such other terms as would clearly show its nature and extent."

For the error thus pointed out in the manner of rendering the judgment, the judgment is reversed, and the cause is remanded, with directions to render a judgment in conformity with the verdict, as herein indicated.

*Reversed and remanded.*

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BENJAMIN M. SHAFFNER *et al.*

v.

J. S. APPLEMAN *et al.*

*Opinion filed December 22, 1897.*

1. SOLICITOR'S FEES—*when solicitor's fee is properly allowed in foreclosure.* Where a second mortgagee seeks foreclosure subject to the prior mortgage, without making the prior mortgagees parties to his bill or seeking to affect their rights, and the prior mortgagees are allowed to answer the bill and file a cross-bill to foreclose their mortgage, upon foreclosure being decreed a solicitor's fee may be allowed in pursuance of a provision of the prior mortgage, and included in the amount found due thereunder.

2. APPEALS AND ERRORS—*objections to allowance of items by master, on foreclosure, should be made below.* The Supreme Court cannot consider an objection to the allowance of an item by the master, on foreclosure, where no objection thereto was made before the master or exception made in court.

3. SAME—*mortgagor cannot complain that no personal decree was rendered against him.* A mortgagor cannot complain that a foreclosure decree did not direct him to pay the amount found due, but merely ordered the premises to be sold in default of payments, as the latter is the proper form of a decree *in rem*.

*Shaffner v. Appleman*, 70 Ill. App. 684, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

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| 106a | 184  |



B. M. SHAFFNER, for appellants.

LYMAN & JACKSON, for appellees.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

In this case J. S. Appleman, one of the appellees, filed his bill against Benjamin F. Shaffner and Joseph Shaffner, the appellants, and Clara Shaffner, to foreclose a trust deed made by them on certain premises to secure a note held by Appleman. Said trust deed was made subject to another trust deed on the same premises to Lyman Baird, trustee, to secure a note which was held at the time of this litigation by Sarah A. Whittemore. Appleman did not make the trustee or party secured by the prior trust deed defendant to his bill, and did not seek to affect the rights or interests of either in any manner, but asked for a foreclosure subject to such prior trust deed. Lyman Baird and Sarah A. Whittemore filed their petition in the suit to be made parties defendant and allowed to answer the bill and to file a cross-bill. Leave was given, and petitioners answered the bill (which made no charge against them and did not seek any relief affecting them) by neither admitting nor denying its allegations, and thereupon they filed their cross-bill for a foreclosure of their prior trust deed. Issues having been made up on the bill and cross-bill, they were referred to a master, who reported the amount due on each trust deed, and there was a decree for a sale of the premises and payment of the amounts found due in the order of their priority. The decree has been affirmed by the Appellate Court.

The master found that \$300 was a reasonable solicitor's fee for services rendered in the foreclosure of the first trust deed by means of the cross-bill, and included the same in the amount due upon said trust deed in pursuance of a stipulation therein contained. The court overruled appellants' exception to the allowance of such

fee, and it is insisted that the court was in error, under the rule stated in *Soles v. Sheppard*, 99 Ill. 616. This is due to a misapprehension of that case. Sheppard was a defendant in a foreclosure suit as the holder of a junior lien, which, upon a sale, would be transferred to the surplus after satisfying the first mortgage, and he could have obtained payment without a cross-bill, on a mere motion. The holder of the mortgage had a right to bring Sheppard into court and have his interest subjected to the decree, but a junior mortgagee has no right to file a bill and compel a foreclosure of a prior mortgage. He may redeem from such prior mortgage, but it is the privilege of its holder to foreclose it or not, as he may see fit. So in this case, Appleman could not file a bill and compel a foreclosure or satisfaction of the trust deed securing Sarah A. Whittemore. No objection was made to the petitioners coming into the suit and filing the answer and cross-bill, without which there would have been no foreclosure of the prior trust deed. The solicitor's fee was properly allowed, and the court did not err in overruling the exception. •

Objection is made to another item of \$17.58 for an examination of title; but there was no objection before the master or exception in the court to the allowance of that item, and it cannot be questioned now.

It is also argued that the decree is fatally defective because it does not direct appellants, or either of them, to pay the amounts found to be due, but merely orders the premises sold in default of payment by the appellants or some one of the defendants to the cross-bill. This is the proper form of a decree *in rem*, and it is not a ground of complaint on the part of appellants that there was no personal decree against them. They were certainly not injured by an omission of that kind.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## THOMAS GEDYE

v.

## THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed December 22, 1897.*

1. MURDER—*what competent in murder trial as showing that defendant anticipated an encounter.* On the trial of a landlord for murdering a son of his tenant in an encounter which took place on an attempt by the landlord to smoke the tenant out and carry away window sash from the house, it is competent to prove that there was snow on the ground and that the tenant's youngest child was a mere baby, as showing that the landlord probably knew that his attempt would be desperately resisted.

2. SAME—*what sufficient to sustain a conviction for murder.* Evidence that the defendant went to his tenant's house on a winter morning and stopped up the chimney so as to smoke the occupants out, and was carrying away the sash from a window when he was interrupted by the tenant and his son, and that in the encounter which took place on their resisting the attempt to carry away the sash the defendant stabbed the son in the breast with an iron rod, killing him, is sufficient to sustain a conviction for murder.

3. SAME—*when theory of self-defense is not sustained by evidence.* A theory that the defendant charged with murdering the son of his tenant was retreating when the deceased became the aggressor, and that the mortal wound was inflicted by the defendant in self-defense, is not sustained by evidence that the defendant, when retreating, was carrying away window sash from the tenant's house in furtherance of his attempt to make the house uninhabitable, and that the fatal encounter resulted from the son's resisting the attempt to carry away the sash, as he might rightfully do.

4. SAME—*tenant may forcibly resist landlord's unlawful attempt at forcible eviction.* A tenant may defend with force the rented premises constituting his home, against his landlord's unlawful attempt to drive him out by stopping up the chimney and removing a window from the house in the winter, so as to make it uninhabitable, even though the tenant is in arrear for rent.

5. EVIDENCE—*what not reversible error in admission of evidence at murder trial.* Evidence admitted in a murder trial that the deceased, who had been stabbed in the breast by the defendant with a sharp iron rod, ran a short distance, and, exposing his breast, said, "Look where he speared me; I am done; I am gone," immediately expiring, is not reversible error, whether the declaration was a dying declaration or not, where the truth of the statement is undisputed.



WRIT OF ERROR to the Circuit Court of LaSalle county;  
the Hon. CHARLES BLANCHARD, Judge, presiding.

BUTTERS, CARR & GLEIM, for plaintiff in error.

EDWARD C. AKIN, Attorney General, (D. C. HAGLE,  
C. A. HILL, WILLIAM H. STEAD, and EDGAR ELDREDGE,  
of counsel,) for the People.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the  
court:

At the March term, 1897, of the circuit court of LaSalle county, the plaintiff in error was convicted of the murder of William Morgan, and sentenced to the penitentiary for a term of fourteen years. The evidence at the trial was to the following effect: The defendant, Thomas Gedye, owned a lot about one hundred feet square, fronting west on Cash street, in Seneca, Illinois, on which there were three dwelling houses. The one on the north side of the lot was a double house, the north half of which was vacant and the south half was occupied by his tenant, Charles Morgan, with his family, consisting of his wife, Melinda Morgan, their son William Morgan, the deceased, who was twenty-three years old, another son, James Morgan, fourteen years old, and an infant child about one year old, and they had a boarder, a man named Jack. Fourteen and a half feet south of this double house was another of the houses, occupied by another tenant, and the house on the south side of the lot was the residence of the defendant, Gedye. On February 15, 1897, the Morgans owed one month's rent, which was due on the 11th, and defendant called at the house on that evening and told Mrs. Morgan if she could not pay the rent by the next night he wanted an empty house. She told him that he would have to give them more time, and that they could not move out in that time. The men of the Morgan family were coal miners, and the next morning,

about half-past six o'clock, Gedye saw the young man, William Morgan, and the boarder, Jack, start for the coal mine where they worked. Soon after, Gedye, supposing that only the father, Charles Morgan, was at home with the family, went to his barn and took an iron rod half an inch thick and about six feet long, drawn to a sharp point at one end and used as a spear for killing muskrats, and procuring a piece of blanket or old rag which he carried in a game bag, went into the kitchen in the vacant half of the Morgan house, opened the chimney-hole on that side of the partition and shoved the piece of blanket or rag downward and into the chimney-hole on the other side, to smoke the family out of the house. Smoke filled the house, and, the inmates supposing it to be on fire, Charles Morgan was trying to find out what was the matter. In the meantime Gedye went around to the front and took off the storm-door and carried it away, leaving the spear setting by the house. He came back with a hammer and chisel, and going to the west window on the south side set the spear down by the house and took out the upper sash by removing the casing. He was proceeding to take out the lower sash when Charles Morgan came around behind him and took hold of his arm, and William Morgan, who had returned, appeared at the open window on the inside. When Charles Morgan took hold of his arm, Gedye was gathering up his tools and attempting to take the sash away, but dropped them and struck Charles Morgan on the neck with the spear. William Morgan jumped out of the window and running to the kitchen got an old shot-gun and came back to where Gedye was. A combat took place between them, in which William Morgan used the shot-gun and Gedye the spear. William Morgan struck Gedye with the shot-gun probably two or three times, and one blow broke the gun stock and knocked Gedye down upon his hands and knees, but he got up and thrust the spear into the breast of William Morgan, penetrating his heart. The wounded man ran

around the house and across an alley into the house of a neighbor, where he fell upon the floor and expired.

It is argued that although Gedye wrongfully attempted to drive the Morgan family out of their home, filled it with smoke and was taking out the windows, yet he had started to retreat before the mortal blow was given; that the Morgans became the aggressors, and that such final blow was in self-defense. We do not see how this position can be maintained under the evidence. There are some inconsistencies between the testimony of members of the family given at the coroner's inquest and upon the trial of the cause, but the jury and trial judge, who saw and heard them testify, believed in their truthfulness with better opportunities for judging than we have; and even considering it, as we must, upon the record merely, we do not think that, when all the evidence is considered, it fairly tends to prove that Gedye retreated or in any manner in good faith endeavored to decline further struggle with the deceased before killing him. Gedye, of course, expected trouble and opposition in his undertaking, and testified that he expected danger and that Charles Morgan would not let him prosecute his enterprise without a contest. He did not anticipate any danger from William Morgan because he supposed that he was absent, and believed he could overcome the resistance of Charles Morgan. He knew that the family would not let him smoke them out and take out their windows in the winter time without active resistance. He was the aggressor, and the Morgans had a right to defend their habitation. After bringing on the difficulty it is true that he discovered the presence of William Morgan, and, realizing that the odds might be against him, perhaps attempted, as he says, to carry off the sash which he had taken out. According to his account of the retreat that was all there was of it, and he was trying to get away with the sash. That was nothing but a prosecution of the same enterprise of freezing the family out, which they

were resisting and had a right to resist. The encounter lasted but a few minutes and was near the house—between it and the other house, which was fourteen and a half feet away. Gedye did not claim to remember distinctly what did happen after he was struck by the gun, and a disinterested witness, who had the best opportunity to see what occurred, testified that he advanced upon the deceased and thrust the spear into his breast. There was other evidence of disinterested witnesses showing that Gedye was the assailant when the mortal blow was given. We see no reason for disturbing the conclusion of the jury and trial judge from the evidence.

It is complained because the court admitted proof of the state of the weather,—that there was snow on the ground, and that the youngest member of the family was a baby about a year old. It was material and proper to show the conditions under which Gedye undertook to dismantle the house and smoke the family out, for the purpose of determining whether a reasonable man would anticipate such a difficulty as occurred as a probable consequence of his acts. Under the conditions shown, any sane man would know that the Morgan family would not submit to the wanton invasion of their habitation. The evidence was competent to show that Gedye provoked the difficulty under such circumstances as would excite certain and probably desperate resistance.

It is also objected that the court admitted in evidence statements made by William Morgan to Annie Lettsome after he was wounded, while going into the neighbor's house where he immediately died. She testified that he pulled his shirt away and showing the wound said: "Look where he speared me; I am done; I am gone." In the first place, the statement had already been testified to without objection by Elizabeth Suddick, and was already in evidence. In the next place, it was a fact about which there was no dispute or question. No possible harm came to defendant by its admission, and it is not worth our

while to discuss questions whether it was a dying declaration or part of the *res gestæ*. The same may be said as to a statement of Melinda Morgan, wife of Charles Morgan, as to what Charles Morgan said during the occurrence when he came into the kitchen and shut the door. Charles Morgan had already testified, without objection, to the same thing in substance, and there had been no contradiction of it. It may be added as to the last statement, that it was unquestionably a part of the *res gestæ*.

During the cross-examination of Charles Morgan he was asked if he did not testify to a certain fact before the coroner's jury, and he said that he did not think he did but would not swear that he did not, for he hardly knew what he did say that night. He was then asked, "If you did testify to that, was it true or not?" He answered, "I won't swear, sir." And after the answer the court sustained an objection to the question. This is complained of, but there was no error in the ruling. Counsel was not debarred from asking the witness whether the fact existed and whether the witness had so testified, and did examine him fully on both those questions.

The court gave a great many instructions on behalf of defendant in all the varying forms in which the same propositions of law are usually differentiated in criminal cases, dwelling in different instructions, with needless reiteration, upon the doctrine of reasonable doubt and the rules of law favorable to the defendant; but objection is still made because more were not given. It is urged that the 46th and 47th instructions on the question of self-defense should have been given. They were both bad. The 46th stated, in substance, that the jury should find the defendant not guilty if there was a reasonable doubt as to whether he was acting in necessary self-defense in killing William Morgan. There might be a reasonable doubt, and the jury be perfectly convinced on that subject that he was not acting in necessary self-defense, and yet the instruction would require an acquit-

tal. The 47th was of the same character, and, besides, made no reference whatever to the evidence. The 22d, 24th, 25th and 29th instructions given at the request of the defendant covered the whole doctrine of self-defense, and the 29th covered the ground which was doubtless intended to be stated in the 46th and 47th, by requiring that the jury should believe, from the evidence, to a moral certainty, that the wound was not inflicted by the defendant on the deceased in necessary self-defense, within the meaning of the instructions. The defendant could not ask more than was there stated. There was no error in giving or refusing instructions of which the defendant had any cause for complaint, and the record is remarkably free from error of any sort.

The judgment will be affirmed.

*Judgment affirmed.*

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JANE HUFFMAN *et al.*

v.

NOAH YOUNG *et al.*

*Opinion filed November 8, 1897—Rehearing denied December 22, 1897.*

1. **WILLS**—words may be restricted so as to carry out the intention. If the testator's intention is apparent and is not contrary to some rule of law it must prevail, although, in giving effect thereto, some words must be rejected or so restricted in their application as to materially change their literal meaning.

2. **SAME**—false words of description of devise may be stricken out. In arriving at the intention of the testator false words of description of devised premises may be stricken out, and if enough remains to identify the premises intended to be devised the will may be read and construed with the false words eliminated.

3. **SAME**—illustration of rule that devise may be sustained by striking out false words of description. A devise of sixty-two and one-half acres of land "off the east side of the north-east quarter" of a certain section will be sustained by striking out the words "off the east side," where it appears that all the land owned by the testator in that quarter was sixty-two and one-half acres, which lay in the north end thereof, the rest of the eighty being owned by other parties.

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| 185  | 382  |
| 170  | 290  |
| e189 | 1508 |
| d189 | 510  |
| 170  | 290  |
| 197  | 1405 |
| 197  | 2405 |

WRIT OF ERROR to the Circuit Court of Vermilion county; the Hon. F. BOOKWALTER, Judge, presiding.

This was a proceeding in chancery for partition and an accounting of rents, etc., brought by plaintiffs in error in the Vermilion circuit court. The bill alleges that the parties complainant and defendant are the owners of a strip of land seventeen rods in width off the west side of the east half of section 20, township 21, north, range 11, west, in Vermilion county, Illinois, except about three acres off the south end; that they derived title thereto, by descent, from Charles S. Young, who died testate, but without making disposition of the said strip; that testator left undevise, and as intestate property, about 800 acres of land; that at the time of making said will, and at testator's death, there were located on said strip three dwelling houses, each fronting on a road running along the west side of said strip, two of which were occupied by testator's daughters; that the greater portion of the east half of the north-east quarter of said section was devised to Noah Young as "62½ acres off the east side of said quarter section;" that the strip sought to be partitioned is the balance of said 80-acre tract; that defendant Noah Young is in possession of said strip, and has received the rents thereof since testator's death. The bill alleges that five of defendants are minors, and prays for partition and an accounting of the rents and profits. A guardian *ad litem* was appointed by the court for the minor defendants.

The adult defendants, except Noah Young, failed to answer, and were defaulted. Noah Young in his answer averred that he was the sole owner of said strip; that he derived title thereto by virtue of the last will of Charles S. Young, and relied upon the following clause of the will as his evidence of title:

"Item 3.—I give and devise to my son, Noah Young, the north-west quarter of section twenty-one (21), town-



ship twenty-one (21), north, range number eleven (11), west of the second principal meridian; also  $62\frac{1}{2}$  acres off of the east side of the north-east quarter of section number twenty (20), township and range aforesaid."

The answer admits that there are three houses on said strip, and that two were, at testator's death, occupied by two of testator's daughters, but avers said daughters were occupying them as tenants of testator; admits possession, but denies having received any rents except what he had expended for taxes, etc.; denies that testator did not make any disposition of the strip in controversy, and avers that the same is devised to him in the third clause of said will; avers that when said testator made his will this defendant was, and now is, the owner of 160 acres adjoining said strip on the west, and that testator owned the 160 acres on the east of said strip; that the homestead was on the last named 160 acres, and that the homestead, 160 acres, and the land owned by testator in the east half of the north-east quarter of section 20, (the land in controversy,) constituted what was known as the "home farm," and that testator had long purposed giving the "home farm to Noah, because he was the eldest son and the owner of the adjoining land on the west;" avers that when said will was made the Chicago and Eastern Illinois Railroad Company owned a right of way across said east half of the north-east quarter from north to south, one hundred feet wide, which right of way was three hundred and thirty-three feet west of the east line of the 80-acre tract; that in addition to said right of way there was laid out, off the south end of said 80-acre tract, a part of the village of Bismarck; that on the east side of the right of way the plat covers fifty-four rods north of the south line of said tract, and on the west the plat extends twenty-six rods north; that decedent, at the time of making his will and at his death, did not own any part of said village west of said right of way; that all the land owned and claimed by testator in said east half of the



north-east quarter was about  $62\frac{1}{2}$  acres; that the same was off the north end, rather than the east side, and was exclusive of the right of way of said railroad company; that if the strip is partitioned as prayed for, he will have but 48 acres instead of  $62\frac{1}{2}$  given to him by said will, and that a part of the land will be cut off from any highway and will not be accessible from his other lands; denies that testator left any lands not disposed of by his will, but avers that as to a part of the lands the will was held void by the circuit court of said county for want of certainty in the designation of beneficiaries, and that the said 800 acres had been partitioned.

The complainants put in a replication to the answer, and on the hearing the defendants called as a witness E. R. E. Kimbrough, who testified that "Charles S. Young, at the time of making his will and at the time of his death, owned but  $62\frac{1}{2}$  acres in the east half of the north-east quarter of section 20, township 21, north, range 11, west of the second principal meridian, and this was off the north end of the tract, and was exclusive of the right of way of the Chicago and Eastern Illinois Railroad Company, one hundred feet wide, which was owned by said railroad company in fee. The right of way extends across said land from north to south, and is about three hundred and thirty feet west from the east line of the said tract. Charles S. Young owned  $62\frac{1}{2}$  acres over and above the right of way, on the north end, rather than off the east side thereof. He did not own the south end, which was a part of the village of Bismarck. The allegations of fact alleged in the answer of Noah Young are true as therein stated, except such allegations as are only the conclusions of the pleader. At the time the will was executed, and at the time of the death of said testator, Noah Young, the defendant and eldest son of the testator, owned and occupied the 160 acres of land adjoining the  $62\frac{1}{2}$  acres on the west. By the will he was given the lands adjoining the  $62\frac{1}{2}$  acres on the east. The home farm consisted of

this 62½ acres and the adjoining lands on the east. Testator owned no land on the north or south of this 62½ acres. There is no access to that part of the 62½ acres west of the railroad, except from the west side of the north-east quarter of section 20, as aforesaid. The 'home farm' was a compact body of land, and was specifically devised by the testator, unless the contention of the complainants is true as to a part of 62½ acres; that the latter tract contained the land owned by Noah Young, with the homestead of testator, which is specifically given to said Noah Young by the will; that, exclusive of said railroad right of way and the land occupied by the village of Bismarck, there are but 62½ acres of land in said east half of the north-east quarter of section 20, and that was all the land owned by said testator in said east half at the time of making the will and at the time of his death."

HARVEY C. ADAMS, for plaintiffs in error.

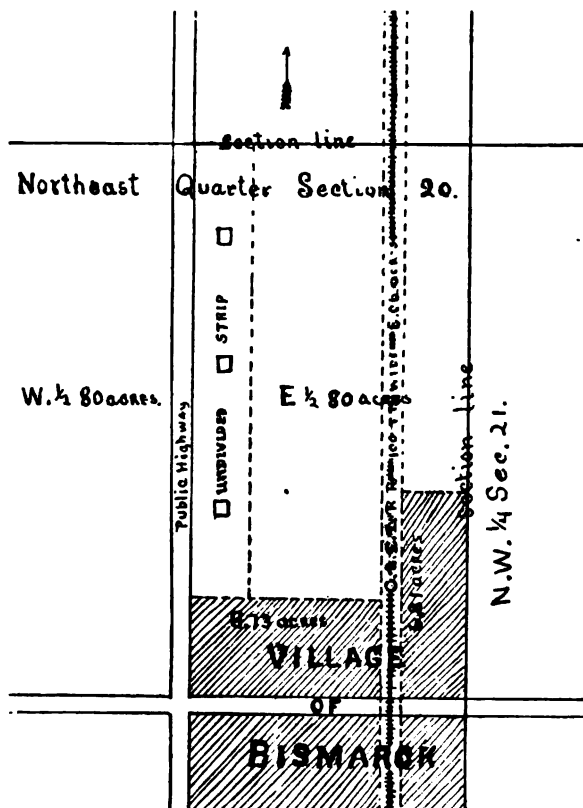
E. R. E. KIMBROUGH, and JAMES A. MEEKS, for defendants in error.

MR. JUSTICE CRAIG delivered the opinion of the court:

Whether the 14½ acres of land in controversy are to be regarded as intestate property belonging to the heirs of Charles S. Young, deceased, and as such subject to partition, or whether they passed to the defendant Noah Young, depends upon the construction to be placed upon the will of Charles S. Young. The will was made an exhibit to the answer of Noah Young, and among other provisions it contains the following:

"*Item 3.*—I give and devise to my son, Noah Young, the north-west quarter of section twenty-one (21), township twenty-one (21), north, range number eleven (11), west of the second principal meridian; also 62½ acres off of the east side of the north-east quarter of section number twenty (20), township and range aforesaid."

There is no question or doubt in regard to the first tract of land named in the above bequest, but as to the other tract, it was not owned by the testator at the time of making the will or at his death. The following plat shows the land in dispute, and also the land held by other parties embraced in the description named in the will:



From the plat and the other evidence introduced on the hearing, it appears that the Chicago and Eastern Illinois Railroad Company owned a right of way consisting of over six acres which would fall within the description given in the will, and a part of the south end of the tract named in the will constituted a part of the village of Bismarck. The evidence showed that the testator did own

62½ acres in the 80-acre tract, but not 62½ acres off the east side. It is manifest the testator never intended to devise land that he did not own, but his intention doubtless was to devise that 62½ acres of land that he did own in the north-east quarter of section 20. In the construction of wills, as has often been declared by this and other courts, the great and important question is to arrive at the intent of the testator, and when the intent can be ascertained, and it is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words may be rejected or so restricted in their application as materially to change the literal meaning of the particular sentence.

In *Decker v. Decker*, 121 Ill. 341, where by the literal reading of the language of the will the testator had conveyed land which he never owned, words were rejected to carry out the intent of the testator. It is there, among other things, said (p. 352): "Tested by these principles, it is very clear that in the devise under consideration there is a latent ambiguity. On the face of the will the subject matter of the devise is clear, but on inquiry it is found that the descriptive words of the devise are, in part, false. The parcel of land appearing to be devised did not belong to the testator. If, then, we may strike out of the description of the premises appearing to be devised so much as is false, and enough remain in the will, interpreted in the light of surrounding circumstances at the time the will was made, to identify the premises devised, this case will fall within the class of cases of which *Patch v. White*, *supra*, (and many other cases named,) are examples as to the object of devise."

The defendant Young in this case does not seek to inject into or add to the will any words which may explain the real intent of the testator to devise him the land. He does not desire to add a word or sentence to the will. He only asks that the false words found in the description of the premises devised may be stricken out,—words

that place the testator in the false attitude of devising lands he never claimed or owned.

What was said in *Whitcomb v. Rodman*, 156 Ill. 116, applies with much force here. It is there said (p. 125): "While words cannot be added to a will, yet in arriving at the intention of the testator, as has been shown by the authorities, so much as is false in the description of the premises devised may be stricken out, and, after striking out the false description, if enough remains to identify the premises intended to be devised, the will may be read and construed with the false words eliminated therefrom."

Adopting the rule established in the cases cited, and striking out the words "off of the east side," the third item of the will will read: "I give and devise to my son, Noah Young, the north-west quarter of section twenty-one (21), township twenty-one (21), north, range eleven (11), west of second principal meridian; also 62½ acres of the north-east quarter of section number twenty (20), township and range aforesaid." This description is sufficiently definite to include the land in dispute.

Reliance, however, is placed upon *Bingel v. Volz*, 142 Ill. 214. Upon an examination of that case it will be found that there is no inconsistency between it and the *Decker case* and the case of *Whitcomb v. Rodman*. In the *Bingel case* an attempt was made to reform a will by striking out certain words and inserting others, which it was held could not be done. No effort is made here to strike out words and insert others in their place, but all that is asked here is, that certain false words in the description of the premises may be stricken out, which the *Bingel case* holds may be done, as is apparent from what is there said, as follows (p. 225): "Doubtless, if there were repugnant elements in the description employed in the devise in question, and if the description, after rejecting a repugnant element, were complete in itself, so as to accurately and sufficiently describe the land intended to be described, that rule of

construction might be adopted. \* \* \* The difficulty of the description as it appears in the devise is, that it substitutes 'north-west' for 'south-west,' and the correction of the description so as to make it apply to the right tract requires not only that one of these words should be stricken out but that the other should be inserted. It involves more than construction—it requires reformation; and in this State, at least, courts of equity have persistently refused to entertain bills to reform wills." Nothing of the character mentioned in the case cited is claimed here.

We think the decree of the circuit court dismissing the bill was correct, and it will be affirmed.

*Decree affirmed.*

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JOHN ANGUS *et al.*

*v.*

THE CHICAGO TRUST AND SAVINGS BANK.

*Opinion filed December 22, 1897.*

1. PLEADING—*plea puis darrein continuance waives all previous pleas.* A plea *puis darrein continuance* waives all previous pleas and defenses, and confesses everything constituting the cause of action except the matter contested by such plea, and by operation of law all previous pleas are stricken from the record.

2. EVIDENCE—*when defendant has the burden of proof on plea puis darrein continuance.* Where the only issue presented by a plea *puis darrein continuance* to a declaration on promissory notes is whether certain checks were given and received in full settlement of the notes, the burden of proving such issue is upon the defendant.

3. PAYMENT—*when giving checks does not operate as a payment of notes.* Evidence that the defendant to a suit on notes gave certain ante-dated checks to the plaintiff after the beginning of the suit, and that the plaintiff was to hold the notes and the suit was to stand until the checks were paid, does not tend to prove that the plaintiff accepted the checks in full settlement of the notes, but shows merely that they were received as a mode of payment.

4. PRACTICE—*court should direct a verdict for plaintiff where evidence does not tend to prove issue made by plea puis darrein continuance.* The

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| 170 | 298 |
| 83a | 605 |
| 170 | 298 |
| 84a | 575 |
| 170 | 298 |
| 183 | 521 |

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| 170 | 298 |
| 184 | 425 |
| 88a | 88  |

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| 170 | 298  |
| 94a | 1513 |

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| 170 | 298  |
| 201 | 1592 |

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| 214 | 2526 |

court should direct a verdict for the plaintiff where the evidence does not tend to prove the payment of the debt sued for, which payment is set up by a plea of *puis darrein continuance*.

5. **SAME**—*when case may be placed on short cause calendar after being stricken therefrom.* Striking a case from the short cause calendar in order to give the defendant time to pay certain ante-dated checks, given as a mode of paying the notes in suit after the case was put upon the short cause calendar, does not deprive the plaintiff of his right to have the cause again placed thereon upon the defendant's default in paying the checks.

6. **WAIVER**—*consenting to trial waives alleged error in denying previous motion to strike from calendar.* A defendant consenting to go to trial before a jury of eleven men waives his right to urge as error the denial of his previous motion to strike the cause from the short cause calendar.

*Angus v. Chicago Trust and Savings Bank*, 68 Ill. App. 425, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. W. G. EWING, Judge, presiding.

REBER & NOBLE, for appellants.

CRATTY BROS., JARVIS & CLEVELAND, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is an action of assumpsit, brought by appellee against appellants on August 16, 1893, upon two promissory notes executed by the appellants, Angus & Gindele, payable to the order of James F. Keeney, and endorsed by Keeney to the appellee herein. The defendants were not served with process until June 14, 1895. On July 3, 1895, they filed two pleas: first, non-assumpsit, second, the plea of payment. On September 21, 1895, leave was given to the defendants to file special pleas, and on September 23, 1895, they filed two special pleas. The latter pleas were demurred to, and the demurrers were sustained. On January 27, 1896, leave was given to the defendants to file an additional plea instanter, and to

plaintiffs to reply thereto instanter. The additional plea thus filed was a plea *puis darrein continuance*. A replication was filed to said plea, which will be mentioned hereafter. The cause was tried before a jury, who found the issues for the plaintiff, and assessed its damages at the sum of \$2027.27. The latter amount was the sum total of the principal and interest due upon the notes sued upon. Motion for a new trial was overruled, and judgment rendered upon the verdict for the amount thereof. Upon appeal to the Appellate Court, the judgment has been affirmed; and the present appeal is from such judgment of affirmance by the Appellate Court.

The appellants seek a reversal of the judgment upon two grounds only.

*First*—It is claimed by the appellants; that the court erred in instructing the jury to find a verdict for the plaintiff, and to assess its damages at the sum of \$2027.27. The giving of the instruction so given in writing was waived. The court committed no error in thus instructing the jury.

The additional plea, filed on January 27, 1896, being a plea *puis darrein continuance*, waived all previous pleas, and confessed the matter in dispute between the parties. The general rule is, that a plea *puis darrein continuance* supersedes all other pleas and defenses in the cause; and, by operation of law, the previous pleas are stricken from the record, and the cause of action is admitted to the same extent, as if no other defense had been urged than that contained in this plea. Everything is confessed except the matter contested by the plea *puis*. (*City of East St. Louis v. Renshaw*, 153 Ill. 491, and cases there cited). Here, the plea *puis* alleges that, after the last proceeding in this cause, that is to say, after the 4th day of November, 1895, the defendants gave to the plaintiff, and the plaintiff there accepted from the defendants, their checks payable to the order of D. H. Tolman (the president of the appellee bank), said checks being nine in number, of different amounts, and of different dates be-



tween November 11, 1895, and July 11, 1896, and amounting altogether to \$4536.93; most of which checks were dated in advance. The plea *puis* also avers, that these checks were given to the plaintiff and received by it in full settlement of the notes sued on in this cause. To this plea a replication was filed by the plaintiff, in which it was averred that the said checks were not given to the plaintiff and received by it in full settlement of the notes sued on in this cause.

It thus appears that the issue or matter in dispute between the parties, as presented by the plea *puis* and the replication thereto, was whether or not the checks were given and received in full settlement of the notes sued on. The burden of proof upon this issue was upon the appellants; and there is no evidence in the record which tends to support the issue thus made. The only testimony upon the subject in support of the contention of the appellants was given by the appellant, Gindele, who says: "I gave Mr. Tolman about eight or ten checks, in payment of all that Angus & Gindele owed him, as in full settlement. He was to retain all the notes and pass them over as fast as we paid the checks. He was to retain the notes as collateral, and this suit was to stand until the checks were paid. The checks were dated ahead from one month to six or seven months." Several of the checks were paid, but others were not paid. When default was made in their payment, the pending suit was pressed to trial. The arrangement in regard to the acceptance of the checks was made on November 4, 1895, while the suit was pending, and after it had been put on the short cause calendar for trial. The suit was not dismissed, but its prosecution was merely delayed, in order to give the defendants an opportunity to pay the checks. The checks were thus given and received merely as a mode of payment of the notes, the notes being surrendered if the checks were promptly paid, but not otherwise. By this method time was given to the appellants,

but the action was not discharged in case of a default in payment.

There being no evidence tending to sustain the issue made by the plea *puis darrein continuance* and the replication thereto, the court very properly instructed the jury to find the issues for the plaintiff. As to the amount due upon the notes, there was no dispute. The testimony was, that there was due on the notes with interest the amount for which the verdict was rendered.

*Second*—Appellants also contend, that the trial court erred in refusing to strike the case from the "short cause calendar." This motion, so far as can be ascertained from the imperfect abstract of the record filed herein, was made about March 30, 1896, when the case was last called for trial. The motion to strike the case from the short cause calendar was made upon the alleged ground, that the case had been previously stricken from the trial court's short cause calendar. Section 3 of the Short Cause Calendar act, provides that, "If the trial of any suit which is upon the short cause calendar shall occupy more than one hour's time, then the court may, in its discretion, stop the trial, take the case from the jury and continue it, and the suit shall go to the foot of the docket and shall not again be placed upon the short cause calendar," etc. (3 Starr & Cur. Stat. p. 1001). Here, the cause was never stricken from the short cause calendar and placed at the foot of the docket because the trial thereof lasted over an hour. On the contrary, the proof shows that, on September 20, 1895, affidavit and notice to place the cause on the short cause calendar were filed; and that, on November 4, 1895, the suit was stricken from the short cause calendar. This, however, was only done because of the arrangement for the settlement of the suit by the giving of checks as above stated. It was thus stricken from the calendar for the benefit of the appellants, and in order to give them time to pay their checks. Subsequently, in January, 1896, it was again placed by the ap-

pellee upon the short cause calendar because of the failure of the appellants to pay their checks; but the cause was again stricken from such calendar in February, when appellants paid the installment then due. Subsequently, in March, 1896, it was again placed upon the short cause calendar, and was tried. It is very manifest, that no attempt was made to try the case, except on March 30, 1896. The case was merely passed or continued from time to time for the accommodation of the appellants. It evidently comes within the meaning of section 4 of the Short Cause Calendar act, which provides, that "a suit upon the short cause calendar may be passed or continued for good cause shown, the same as other suits, and if so passed or continued, it shall lose its place upon such calendar, but may be again placed thereon." (3 Starr & Cur. Stat. p. 1001). It would certainly have been very unjust to allow the appellants to strike the cause from the short cause calendar, when it came on for trial on March 30, 1896, for the reason that it had been previously stricken from such calendar, when the acts of the court in thus striking it therefrom were in the interest and for the benefit of the appellants. We are, therefore, of the opinion, that the court committed no error, under the circumstances, in overruling the motion to strike the cause from the short cause calendar.

In addition to what has already been said, the appellants consented to the trial of the case before a jury of eleven men; and thereby waived their motion to strike the case from the short cause calendar. (*Belford v. Beatty*, 145 Ill. 414).

The judgments of the Appellate and Superior Courts are affirmed.

*Judgment affirmed.*

ADOLPH PETERS

v.

EMMA BALKE.

*Opinion filed December 22, 1897.*

1. **FORCIBLE DETAINER**—*action of, could not be brought against grantor prior to amendment of 1881.* An action of forcible entry and detainer could not be brought against a grantor refusing to surrender possession, prior to the addition, in 1881, of clause 6 to section 2 of the Forcible Entry and Detainer act, (Laws of 1881, p. 97,) and deeds were formerly inadmissible except to show the extent of possession or the animus of the entry.

2. **SAME**—*effect of amendment of section 2 of the Forcible Detainer act.* Clause 6 of section 2 of the Forcible Entry and Detainer act contemplates a case where the grantor, having conveyed by deed, refuses to surrender possession to the grantee; and in an action thereunder the grantor's deed is admissible to show there was a grantor who conveyed and a grantee to whom the conveyance was made.

3. **SAME**—*action cannot be maintained under clause 6 without the introduction of deed in evidence.* An action of forcible entry and detainer by a grantee against a grantor withholding possession, cannot be maintained without the introduction in evidence, at the trial, of the grantee's deed, in order to show not only the extent of his possession, but his right to possession, even though questions of title cannot be tried in such action.

4. **SAME**—*possession of tenant is a sufficient possession under clause 6.* The possession of a tenant at the time when the landlord executed a trust deed for the rented premises is a sufficient possession by the landlord to constitute him a "grantor in possession," under clause 6 of section 2 of the Forcible Entry and Detainer act.

5. **SAME**—*action under clause 6 may be brought against tenant in possession under grantor.* An action of forcible entry and detainer may be brought, under clause 6 of section 2 of the Forcible Entry and Detainer act, against one in possession under the grantor as a tenant, who refuses to surrender possession after demand by the grantee entitled thereto.

6. **DEEDS**—*construction of word "unmarried," as used in trust deed.* The word "unmarried," used by a grantor in making disposition of property in case he "should die unmarried to" a certain person, will be construed as meaning "not being the husband of such person at his death," and not as "never having been married" to her, where it appears that at the time of the deed the marriage was contemplated and afterward occurred, but that the grantor survived the wife and married a second time.

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| 187 | *315 |

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| 170  | 804  |
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7. LANDLORD AND TENANT—*life tenant cannot make lease for longer period than his own term.* A life tenant cannot make a lease for a longer period than his own term unless joined by the remainderman, and his lessee, upon the death of the life tenant, becomes a tenant by sufferance or at will.

8. SAME—*tenancy by sufferance or at will is terminated by demand for possession.* A tenancy by sufferance or at will is terminated by a demand for possession without notice to quit.

9. EVIDENCE—*life tenant presumed not to have made lease exceeding his own term.* It will be presumed, in the absence of evidence to the contrary, in an action of forcible entry and detainer against the lessee of a life tenant, that the life tenant, in executing the lease, did not make it for a longer period than his own term.

*Peters v. Balke*, 68 Ill. App. 587, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. C. G. NEELY, Judge, presiding.

This is an appeal from a judgment of the Appellate Court in favor of the appellee, affirming a judgment of the circuit court of Cook county also in favor of the appellee, rendered in an action of forcible entry and detainer, commenced before a justice of the peace and tried in the circuit court on appeal from the judgment in the justice court, which was against the appellant. The trial in the circuit court was before a jury. No evidence whatever was introduced upon said trial by the present appellant, the defendant below. The only proof introduced was the testimony of one witness, Henry A. Balke, the husband of appellee, and certain documentary evidence, consisting of a written notice or demand for the possession of the premises involved, and of two deeds hereinafter mentioned, one dated December 20, 1889, executed by Edward Muller to Charles S. Gloeckler, trustee, and the other dated May 20, 1895, executed by said Gloeckler, trustee, to the appellee, conveying the premises described in the first deed. The defendant below asked a number of instructions, among which was an instruction

to the jury to find the defendant not guilty, all of which instructions were refused by the court. The court thereupon instructed the jury, that, under the evidence in the case, their verdict must be for the plaintiff. The jury thereupon rendered a verdict, finding the defendant guilty of unlawfully withholding the possession of the premises described in the complaint, and that the plaintiff was entitled to the possession thereof.

The complaint, as filed before the justice on July 26, 1895, alleges that appellee is entitled to the possession of the lower flat of the front house on premises No. 63 Cleveland avenue, Chicago, and that Adolph Peters, the appellant here, and his wife, unlawfully withhold possession thereof from the appellee. The lot, upon which said house stands, is described as lot 8 in the subdivision by George Bickerdike of the east one-half of lot 30 and the north one-half of lot 31 in Butterfield's addition to Chicago. The lot was improved with a two-story building in front, and a cottage in the rear. The house or building in front seems to have consisted of the two flats, spoken of in the testimony as the top flat of the front house and the lower flat of the front house.

The written notice above referred to was a written demand for the immediate possession of the lower flat occupied by appellant, Peters, and was served on Peters on July 22, 1895. Peters stated, after the service of the notice upon him, that he would not move. On December 20, 1889, Edward Muller was the owner in fee of said lot, and lived in the upper flat of the front house with the appellee and her husband, the appellee being his granddaughter, and the said Edward Muller not then being married, and having no family. On that day Edward Muller executed the deed above mentioned to Charles S. Gloeckler, trustee, conveying said lot with the house and cottage thereon to said trustee in trust: "(1) For the grantor for life; (2) after his death, if Magdalena Hubacher, whom he is about to marry, survives him as his

widow, said Magdalena to occupy rear house and draw rents from lower flat of front house; (3) during life of Magdalena, Emma Balke, daughter of C. J. H. Muller, to occupy top flat of front house, etc.; (4) after the death of said Edward Muller, if he should die unmarried to said Magdalena Hubacher, or after the death of said Magdalena, if she should survive said Edward as his widow, then said trustee Gloeckler shall convey said property by good and sufficient deed to Emma Balke, her heirs and assigns, in fee simple." The provisions of this deed are more fully set out in *Muller v. Balke*, 154 Ill. 110.

After the execution of the deed, dated December 20, 1889, and in that month, or in January, 1890, Edward Muller married Magdalena Hubacher. She lived a year or two after said marriage, and died. Edward Muller married again before his death. On May 12, 1895, Edward Muller died in the cottage on the rear of the lot where he and his second wife lived. After his death, and on May 20, 1895, the trustee, Gloeckler, executed a deed to appellee, Emma Balke, in pursuance of the terms of the trust deed, dated December 20, 1889.

The testimony shows, that the appellant, Peters, was living in, and had possession of, the lower flat, described in the demand notice, at the time the deed was made by Edward Muller to Gloeckler, the trustee; and that he had been occupying the same, as tenant of Edward Muller, for a considerable time theretofore.

HENRY M. STOLTENBERG, and SULLIVAN & MCARDLE,  
for appellant:

Where the existence of a tenancy is once shown, in order to entitle a landlord or his immediate or remote grantee to recover possession in any form of action, it is absolutely essential to show that the tenancy was terminated before the suit was begun. *Donohue v. Bank Note Co.* 37 Ill. App. 552; *Dunne v. Trustees*, 39 Ill. 578; *Brownell v. Welch*, 91 id. 523.

When possession alone is relied upon for any legal purpose, an actual possession is contemplated. *Champaign v. McMurray*, 76 Ill. 363; *Insurance Co. v. Marseilles Manf. Co.* 1 Gilm. 236; *Lancey v. Brock*, 110 Ill. 614; *Webb v. Sturtevant*, 1 Scam. 181.

When a deed is admissible in evidence in a forcible entry and detainer suit at all, it is only for the purpose of establishing the extent of the party's claim, or the animus or intention with which a party entered. *Pearson v. Herr*, 53 Ill. 144; *Brooks v. Bruyn*, 18 id. 539; *Huhtalin v. Misner*, 70 id. 205; *Slate v. Eisenmeyer*, 94 id. 96.

In an action of forcible detainer title is immaterial, except for the purpose of showing the extent of possession. Deeds under which the party claims may be read in evidence, not for the purpose of proving title to the land, but the boundaries or extent of possession. *Croff v. Ballinger*, 18 Ill. 200; *Davis v. Easley*, 13 id. 192; *Brooks v. Bruyn*, 18 id. 539.

The right of possession, if any, depending upon title as claimed through deeds, a freehold is therefore in issue. *Sanford v. Kane*, 127 Ill. 595; *Brushy Mound v. McClintock*, 146 id. 643; *Ducker v. Wear & Co.* 145 id. 653.

The word "unmarried," as it is commonly and usually used, means "never having been married." (Century Dictionary; Encyclopedia Dictionary.) And in the interpretation and construction of instruments in writing by the courts, where this word appears, it is given the same meaning. *In re Thistlewaite's Trusts*, 24 L. J. Ch. 712; *Clark v. Colls*, 9 H. L. 601; *In re Saunders' Trust*, 3 Kay & J. 152; *Maberly v. Strobe*, 3 Ves. Jr. 450; *Pratt v. Matthew*, 22 Beav. 328; *Mortens v. Walley*, 54 L. J. Ch. 159; *Hall v. Robertson*, 22 id. 1054; *Bell v. Phyn*, 7 Ves. Jr. 453.

LACKNER & BUTZ, for appellee:

The party entitled to possession may bring suit, not only against an obstreperous grantor, but also against any one who obtains possession through or under him



and refuses to yield it. *Douglas v. Hartzell*, 15 Ill. App. 251; *Kratz v. Buck*, 111 Ill. 40.

The remedy of forcible detainer given by statute in favor of a purchaser at a judicial sale, after the time of redemption has expired, is not restricted to the nominal party against whom judgment is obtained, but may be employed against any one who, before or after the time of redemption has expired, obtains possession from the defendant in the judgment. *Kratz v. Buck*, 111 Ill. 40.

The primary meaning of "unmarried" is "never having been married." But the word is one of flexible meaning, and slight circumstances, no doubt, will be sufficient to give it its other meaning of "not having a husband or wife at the time in question."

In the following cases the word "unmarried" has been held to mean "not having a husband or wife at the time in question:" *Clark v. Colls*, 9 H. L. 601; *Pratt v. Matthew*, 22 Beav. 328; *Mitchell v. Colls*, 29 L. J. Ch. 403; *Day v. Barnard*, 30 id. 220; 27 Am. & Eng. Ency. of Law, 697; *In re Saunders' Trust*, L. R. 1 Eq. 675.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The questions involved in this case are chiefly questions of law, arising out of the action of the circuit court in overruling the objections, made by the appellant in the trial below to the introduction of the deeds, described in the statement preceding this opinion, and in refusing the instructions asked by the appellant.

*First*—The chief objections, made to the deeds, were that their introduction raised a question of title, such as cannot be adjudicated in an action of forcible entry and detainer; and that Gloeckler, the trustee and grantor in the second deed, had no authority, under the trust deed, to convey the premises to the appellee, Emma Balke.

The present action of forcible entry and detainer was begun under clause 6 of section 2 of the Forcible Entry

and Detainer act, which is as follows: "When lands or tenements have been conveyed by any grantor in possession, or sold under the judgment or decree of any court in this State, or by virtue of any sale in any mortgage or deed of trust contained, and the grantor in possession, or party to such judgment or decree or to such mortgage or deed of trust, after the expiration of the time of redemption, when redemption is allowed by law, refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto, or his agent," the person entitled to such possession may be restored thereto. (1 Starr & Curtis' Stat. p. 1175). If there be eliminated from said sixth clause the portion thereof not here applicable, the part applicable to the case at bar is as follows: "When lands or tenements have been conveyed by any grantor in possession \* \* \* and the grantor in possession \* \* \* refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto or his agent."

It is evident, that the sixth clause contemplates a case where the grantor, having conveyed away land by deed, remains in possession, and refuses to surrender possession to his grantee in accordance with the terms of the deed. It follows, that the introduction of a deed is necessary, in connection with the fact of possession, to show that there was a grantor who conveyed, and a grantee to whom a conveyance was made. Before the addition of clause 6 to section 2 of said act, the remedy, in such a case as the case at bar, was by action of ejectment. Before the adoption of said clause, an action of forcible entry and detainer could not be brought under the state of facts contemplated by that clause; and deeds were inadmissible upon a trial of such action, except for the purpose of proving the extent of possession or the animus of the entry. In 1861, the legislature extended the benefits of the Forcible Detainer act to purchasers at judicial sales; in 1874, the benefits of the act were extended to

purchasers at sales under powers in mortgages or deeds of trust; in 1881, the legislature further extended the benefits of this remedy to the grantee of land as against the grantor, who refuses to surrender possession. It is plain, that no suit can be maintained, under the portion of clause 6 now under consideration, without the introduction upon the trial of a deed to the lands sought to be recovered. Such deed must be introduced, not merely for the purpose of showing the extent of the possession, but for the purpose of showing the plaintiff's right to the possession. In this action of forcible entry and detainer, the question of title, as between the plaintiff and the defendant or any one else, cannot be tried. As the right to possession only is involved in this action, and as its object is merely to secure possession of the premises in controversy, a judgment therein is not a bar to an action of ejectment between the same parties regarding the same premises. Here the right of possession does not depend upon the title, but upon the existence of the particular facts specified in clause 6, as grounds for the action of forcible entry and detainer. The title can no more be inquired into for any purpose in this action now than it could before the passage of clause 6. But while this is so, plaintiff cannot recover under the statute unless he offers in evidence a deed for the purpose of showing that he is a grantee entitled to possession. Such has been the ruling of this court in a number of cases. (*Kepley v. Luke*, 106 Ill. 395; *Kratz v. Buck*, 111 id. 40).

The objection, that Gloeckler, the grantor in the deed dated May 20, 1895, had no authority under the trust deed to convey the premises to appellee, is based upon the contention that Muller, before his death, had been married to Magdalena Hubacher. The solution of this contention depends upon the meaning to be given to the word, "unmarried," as used in the following clause in the fourth paragraph of the deed of trust, to-wit: "If he should die unmarried to said Magdalena Hubacher." Ap-

pellant claims, that the word "unmarried" as here used, means "never having been married," while the appellee claims, that said word means "not being married at the time of his death." In other words, appellant claims that the trustee had no right to convey the property to the appellee, because Edward Muller did not die never having been married to Magdalena Hubacher, while appellee claims that such trustee had a right to make such trust deed, because the said Edward Muller at the time of his death was not married to said Magdalena Hubacher, she having died before his death. There is conflict in the authorities as to the meaning of the word "unmarried." Undoubtedly, its original and usual meaning is "never having been married." "But the term is a word of flexible meaning, and slight circumstances, no doubt, will be sufficient to give the word its other meaning of not having a husband or wife at the time in question." (27 Am. & Eng. Ency. of Law, p. 697). In *Clarke v. Colls*, 9 H. L. 601, Lord Cranworth said, that the word "unmarried" "may, without any violence to language, mean either 'without ever having been married,' or 'not having a husband living at her death;'" and, in that case, it was held, that "unmarried" is a word of flexible meaning to be construed with reference to the plain intention of the instrument where it is used and that, as used in the settlement there, it meant, "being without a husband at the time of the death." The same meaning was given to the word in *In re Saunders' Trust*, L. R. 1 Eq. Cas. 675. (See also *Pratt v. Matthew*, 22 Beav. 328; *Mitchell v. Colls*, 29 L. J. Ch. 403; *Day v. Barnard*, 30 id. 220).

In the case at bar, an examination of the various provisions of the deed of trust, as set out in *Muller v. Balke*, 154 Ill. 110, will show that the intention of the grantor in the deed was to give to the words "if he should die unmarried to said Magdalena Hubacher," the following meaning: If he should die not being the husband of Magdalena Hubacher at the time of his death, or if he

should die not having Magdalena Hubacher as his wife at the time of his death. She having died before he did, it may be said that when he died he was unmarried to her. The deed shows upon its face, that it was made in contemplation of an immediate marriage to Magdalena Hubacher. In paragraph 2 the words are, "after his death if Magdalena Hubacher whom he is about to marry," etc. The evidence shows, that the contemplated marriage was consummated within a few weeks after the deed was executed. It seems improbable that the grantor would use language capable of the meaning that he should never be married to Magdalena Hubacher, when, at the very moment he used such language, he contemplated an immediate marriage with her. Inasmuch, therefore, as Edward Muller died without being the husband of Magdalena Hubacher at the time of his death, the trustee, Gloeckler, had the power under the trust deed, after his death, to convey the premises to Emma Balke. We are of the opinion, that there was no error in admitting the deeds in evidence, either upon the ground that their introduction raised a question of title, or upon the ground that the trustee in the trust deed was without authority to convey the premises to appellee.

*Second*—Appellant further contends that, by the use of the words "any grantor in possession," clause 6 contemplates a case where the grantor is in actual possession, that is to say, has an actual *pedis possessio*; that possession by a tenant is not such actual possession as is meant by clause 6; and that, inasmuch as the appellant, Peters, was in possession under Edward Muller before the deed of trust was made on December 20, 1889, and continued in such possession up to the time of the service of the written notice upon him on July 22, 1895, and as the appellee never was in possession at all, therefore the case at bar does not come within the meaning of clause 6 as above quoted. It has always been held by this court, that possession through a tenant is actual possession by the

landlord. (*Lancey v. Brock*, 110 Ill. 609; *Mallett v. Kaehler*, 141 id. 70). It has also been held by this court, that the party entitled to the possession may bring suit, not only against the grantor who refuses to deliver up the possession, but also against any one who obtains possession through or under the grantor and refuses to yield it. "The remedy of forcible detainer given by the statute in favor of a purchaser at a judicial sale, after the time of redemption has expired, is not restricted to the nominal party against whom the judgment is obtained, but may be employed against any one who, either before or after the time of redemption has expired, obtains possession from the defendant in the judgment or decree." (*Kratz v. Buck*, *supra*; *Jackson v. Warren*, 32 Ill. 331). In *Rice v. Brown*, 77 Ill. 549, where a sale was held to have been made by a trustee under and by virtue of the power in a trust deed, and where a party was in possession of the land under the maker of the trust deed, it was held that such party so in possession under the maker of the trust deed was to be considered as a party to the trust deed within the meaning of said clause 6, and that an action of forcible detainer would lie against such party by the purchaser at the trustee's sale, and that a demand upon such party is sufficient. We can see no difference in principle between the case of *Rice v. Brown*, *supra*, and the present case. Edward Muller was the grantor in the deed, dated December 20, 1889, and the trustee, Gloeckler, was the grantor in the deed dated May 20, 1895. The present appellant was in possession under the grantor, Edward Muller; and under the doctrine announced in *Rice v. Brown*, *supra*, there was here a grantor in possession within the meaning of said clause 6.

But the appellant further contends, that he was in possession of the premises under Edward Muller before the deed, dated December 20, 1889, was executed, and that, because of this fact, it was necessary that appellant's tenancy should be terminated. Appellant con-

tends, that there is no evidence in the record showing that his tenancy was ever terminated; and he asked for an instruction to the jury to that effect.

By the terms of the deed, executed by Edward Muller on December 20, 1889, he reserved to himself a life interest only in the premises. When, therefore, he died on May 12, 1895, his interest therein ended. The law is, that a tenant for life cannot make a lease for a longer period than his own term, unless the remainder-man joins; and that, when a person is in possession under a tenant for life, and the latter dies, such sub-tenant is a tenant by sufferance, or a tenant at will. (12 Am. & Eng. Ency. of Law, p. 669; *Wright v. Graves*, 80 Ala. 416; *Horsey v. Horsey*, 4 Harr. 517). While the evidence in this case shows that the appellant was a tenant under Edward Muller, it does not show upon what terms he was such tenant. The nature of the tenancy is not disclosed by the proof. As Edward Muller, the tenant for life, had no power to make a lease to continue longer than his own estate, it will be presumed, in the absence of any evidence to the contrary, that the lease, which he made to the appellant, was only such a lease as he was authorized to make. Consequently, at his death, appellant was merely a tenant by sufferance. He remained in possession for some ten weeks after the death of Edward Muller, and then written demand for immediate possession was made upon him by appellee. Under the circumstances this written demand was sufficient. Where there is a tenancy at will, or by sufferance, such a tenancy is terminated by a demand for possession without any notice to quit. (*Dunne v. Trustees of Schools*, 39 Ill. 578). It follows, that it was unnecessary for the appellee to do anything more in the way of terminating the tenancy of appellant than was done.

We find no error in the rulings of the court below; and, accordingly, the judgment of the Appellate Court, affirming the judgment of the circuit court, is affirmed.

*Judgment affirmed.*

BENSON C. HINKLE *et al.*

v.

THE CITY OF MATTOON.

*Opinion filed December 22, 1897.*

1. AMENDMENTS—*affidavit of mailing notices of application for confirmation of assessment may be amended after judgment.* An affidavit of the mailing of notices of application for confirmation of a special assessment may be amended upon notice to parties interested, at any time after judgment, so as to show the truth of what was really done in the way of service, where the *bona fide* rights of third persons have not intervened.

2. SAME—*when report of assessment commissioners cannot be amended.* A report of special assessment commissioners appointed to estimate the cost of the improvement, which is signed by only two of the three commissioners, cannot be amended after judgment, at a subsequent term, upon the evidence of a member of the city council that all the commissioners were present and agreed on the estimate and report.

3. ESTOPPEL—*parties filing objections to confirmation estopped to raise objections not included.* Parties filing objections to the confirmation of a special assessment are estopped to afterward raise new and different objections on appeal from the judgment of confirmation.

4. SPECIAL ASSESSMENTS—*report of assessment commissioners must be signed.* The requirement of the statute that commissioners appointed to estimate the cost of an improvement shall report their action in writing to the city council, implies that it must be signed by the persons making it, and a report not signed or authenticated in any way by the signatures of the commissioners is not a compliance with the statute.

5. SAME—*all commissioners being present and consulting, majority may agree on estimate.* Where all the commissioners appointed to estimate the cost of an improvement are present and consulting, the majority may determine upon the estimate to be reported, and their report, being evidence of their action, should show the presence of all commissioners, and whether their action was unanimous or otherwise.

6. SAME—*it is a valid objection, in a direct proceeding, that report of commissioners was signed by two only.* It is a valid objection, in a direct proceeding to review a judgment confirming a special assessment, that the report of the commissioners appointed to estimate the cost was signed by two commissioners only, and did not show that the third was present and consulting.

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WRIT OF ERROR to the County Court of Coles county;  
the Hon. L. C. HENLEY, Judge, presiding.

D. T. McINTYRE, for plaintiffs in error.

JAMES W. & EDWARD C. CRAIG, (F. N. HENLEY, City Attorney, of counsel,) for defendant in error:

Where the report of the committee appointed by the city council to estimate the cost of the improvement is signed by but two of the members of the committee, and it appears by the record that the third member of the committee acted with those who signed the report, this is sufficient. *Adcock v. Chicago*, 160 Ill. 611; *Louk v. Woods*, 15 id. 256; *Moore v. Mattoon*, 163 id. 622.

The affidavit of the commissioners appointed to assess the property benefited by the improvement, setting forth the method and manner in which the notices were given to the persons entitled to notice, is a "return" to process, and amendable, as such, before as well as after judgment. *Starr & Curtis' Stat. chap. 7, sec. 4*; *Brown v. Joliet*, 22 Ill. 123; *Einstein v. Joliet*, id. 126; *Chicago v. Walker*, 24 id. 493; *Brown v. Robertson*, 123 id. 631.

The finding of the court that notices had been sent to the owners of premises assessed, as required by law, is conclusive. *Falch v. People*, 99 Ill. 140; *Turner v. Jenkins*, 79 id. 231; *Atkinson v. Steel Co.* 138 id. 192; *Morgan v. Corlies*, 81 id. 75; *Walker v. Abt*, 83 id. 231.

The county court is a court of limited but not of inferior jurisdiction. When it acts within the limits of its jurisdiction the usual presumptions are made in support of its action. *Propst v. Meadows*, 13 Ill. 157; *Von Kettler v. Johnson*, 57 id. 100; *Housh v. People*, 66 id. 178; *Matthews v. Hoff*, 113 Ill. 90; *Barnett v. Wolfe*, 70 id. 641.

Where jurisdiction is assumed by a court possessing general jurisdiction, it will be presumed that all facts necessary to vest jurisdiction existed. The record itself

is *prima facie* evidence of jurisdiction, and will be presumed conclusive on appeal, unless explicitly disproved. 2 Ency. of Pl. & Pr. 448; *Striker v. Kubusk*, 48 Ill. App. 159; *Scott v. White*, 71 Ill. 287; *Hannas v. Hannas*, 110 id. 62; *Rentz v. People*, 77 id. 518; *Propst v. Meadows*, 13 id. 157; *Morgan v. Corlies*, 81 id. 72; *Kenney v. Greer*, 13 id. 432; *Wells v. Mason*, 4 Scam. 84; *Diblee v. Davidson*, 25 Ill. 486; *Perry v. People*, 155 id. 307.

Irregularities in assessment proceedings, unless objected to on the day fixed for hearing, cannot be raised in the Supreme Court. Rev. Stat. chap. 24, sec. 144; *Stone Co. v. Kankakee*, 128 Ill. 175; *Hunerberg v. Hyde Park*, 130 id. 156; *Kedzie v. Park Comrs.* 114 id. 280; *Gage v. Parker*, 103 id. 528; *Andrews v. People*, 109 id. 504; *Young v. People*, 155 id. 247; *Murphy v. Paris*, 119 id. 509; *Burkett v. Bond*, 12 id. 87; *Buckmaster v. Coal*, id. 74; *Sedgwick v. Phillips*, 22 id. 183; *Peck v. Bogges*, 1 Scam. 281; *Schlencker v. Risby*, 3 id. 483.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

A special assessment upon the lots and property of plaintiffs in error for the grading, curbing and paving with brick of West First street, in the city of Mattoon, was confirmed by the county court, and the cause has been brought here by writ of error.

The judgment of the county court is questioned on the ground that the ordinance for the improvement does not specify the nature, character and description of such improvement. It is not claimed that the locality of the improvement is not sufficiently set forth, and in other respects the ordinance is a duplicate of the one considered in *Moore v. City of Mattoon*, 163 Ill. 622, where, although the ordinance was not commended as a model, it was thought that it was not invalid. That objection must therefore be overruled.

It is also assigned for error that the record fails to show that the notice required by statute was mailed to

the land owners ten days before the March term, 1893, at which the judgment of confirmation was entered. I. W. Tremble, J. W. Moore, Cora Moore, George Gilliland, Thomas Holbrook and the Illinois Central Railroad Company, a part of the plaintiffs in error, appeared in the county court and filed objections to the confirmation of the assessment, and hence the court acquired jurisdiction of their persons by their appearance. As to the others who have a right to raise the question, it appears that the affidavit of mailing the notices as originally filed did not state the date of mailing. Afterward, on due notice to plaintiffs in error, an application was made to the court for leave to amend in that particular, and the court, upon sufficient proof, allowed an amendment according to the fact. This was at a term subsequent to that at which the original judgment was entered, and it is insisted that the court had no power to permit the amendment. The mailing of notice is the process provided by the statute as to owners whose names and places of residence are known, and the affidavit is evidence of compliance with the statute in that regard. It may be amended at any time after judgment so as to show the truth as to what was really done in the way of service, upon due notice to parties interested, where the rights of third parties, acquired in good faith, have not intervened. *Dunn v. Rogers*, 43 Ill. 260; *Barlow v. Standford*, 82 id. 298; *Spellmeyer v. Gaff*, 112 id. 29; *County of LaSalle v. Milligan*, 143 id. 321; *Tewalt v. Irwin*, 164 id. 592; Rev. Stat. chap. 7, sec. 2.

There is another error assigned which must be sustained as to those plaintiffs in error who are entitled to assign it, which is, that only two of the persons appointed to estimate the cost of the improvement acted in making such estimate and reporting the same to the city council. (*Adcock v. City of Chicago*, 160 Ill. 611; *Moore v. City of Mattoon*, *supra*.) As before stated, part of the plaintiffs in error appeared in the county court and filed objections,

but this objection was not among them, and having filed specific objections they are estopped by the judgment from now urging new and different ones. When they filed objections they were bound to include all that they had or intended to raise. (*Neff v. Smyth*, 111 Ill. 100; *Karnes v. People*, 73 id. 274; *Dickey v. City of Chicago*, 164 id. 37.) There was an attempt to rectify the error as to those plaintiffs in error who might still raise the question, by an amendment of the record in the county court at a subsequent term of that court. This was done upon the testimony of a member of the city council, who was one of the committee, that the entire committee was present and agreed on the estimate and report. There was no claim or evidence that the report was made in writing by the three members of the committee. It was signed by only two of them, and was correctly set out in the original petition.

It was the rule at common law, that "where a number of persons were entrusted with powers, not of mere private confidence but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority and their act will be the act of the whole." (*Grindley v. Barker*, 1 Bos. & Pull. 236.) Under this rule, where three viewers were appointed by the county court in a proceeding establishing a highway, it was held that where all were present and consulting the majority might decide. (*Louk v. Woods*, 15 Ill. 256.) The ninth clause of section 1, chapter 131, of the Revised Statutes, provides: "Words purporting to give a joint authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or persons." In the case of public officers who constitute a corporation the rule goes further, and all need not be present if there is a quorum or majority for the transaction of business. (*Dennis v. Maynard*, 15 Ill. 477; *Trustees of Schools v. Allen*, 21 id. 120; *Schofield v. Watkins*, 22 id. 66; *Commissioners of Highways v. Baumgarten*, 41 id. 254.) A committee appointed to make

an estimate has none of the qualities of such a corporation, and hence does not come under the latter rule; but when all are present and consulting, a majority may determine upon the estimate which shall be reported as that of the committee. They are required to report their action in writing to the city council, and their report is the evidence of the action taken by them under their appointment. It is argued that the report need not be signed; but we think that the requirement for a report in writing implies that it must be signed by those making it, and that a paper not signed or authenticated in any way by the signatures of the committee would not be a compliance with the statute. As the report is the evidence of what the committee does, it should show the presence of all, and if there is a disagreement or a mere majority report, the fact should be brought to the notice of the council, according to the usual practice, by the report, for the action of the council thereon. It is true that in some cases, where a report has been signed by only two of three persons authorized to act, it has been presumed that the third one was present and consulting; but we have not applied such a presumption in cases of this kind, in a direct proceeding to review the judgment.

The attempt in this case was really to amend the records and proceedings of the city council and to make a good petition out of the defective one after the judgment. If the report was invalid when presented to the city council, the county court had no power to hear evidence and remedy its defects, or those of the petition, at that time. It was not an attempt to make the record truly state what was before the court at the time judgment of confirmation was entered, but to make a new record in the case, and this could not be done. *Ogden v. Town of Lake View*, 121 Ill. 422; *Springer v. City of Chicago*, 159 id. 515.

The judgment of the county court will be affirmed as to the lots and lands of I. W. Tremble, J. W. Moore, Cora Moore, George Gilliland, Thomas Holbrook and the Illi-

nois Central Railroad Company, and they will pay one-half of the costs in this court. As to the remaining plaintiffs in error the judgment is reversed and the cause remanded, and the defendant in error will pay the remaining half of the costs.

*Judgment affirmed in part.*

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CHARLES KAESTNER *et al.*

*v.*

THE FIRST NATIONAL BANK OF CHICAGO.

*Opinion filed December 22, 1897.*

1. APPEALS AND ERRORS—*Appellate Court's affirmance settles controverted questions of fact.* Whether a guaranty sued upon was written upon the note at the time of the endorsement by the party sued as guarantor is a question of fact conclusively settled by the Appellate Court's judgment of affirmance.

2. EVIDENCE—*suit on guaranty of note—when former note containing similar guaranty is admissible.* Where a plea of want of consideration is filed in a suit on the guaranty of a note, a former note guaranteed by the defendants, which was taken up by the giving of the note containing the guaranty in suit, is admissible to show consideration for the latter guaranty.

3. SAME—*when not error to admit proof of consideration of former note.* In a suit on the guaranty of a note it is not error to admit proof of the consideration of a former note guaranteed by the defendants which was taken up by the note containing the guaranty in suit.

4. PARTIES—*suit on joint guaranty may be brought against one or all.* Where a note is guaranteed by an individual and a firm, an action on the guaranty may be brought against the firm alone, without joining the other guarantor.

5. VARIANCE—*what is not a variance between allegation and proof of guaranty.* Where an action is brought against a partnership, as guarantor of a note, the fact that the proof shows that the guaranty was executed by the partnership, together with a third person not joined in the suit, does not constitute a variance.

6. WAIVER—*defendant going to trial without objection waives plaintiff's omission to join issue.* A defendant going to trial without objection waives the plaintiff's omission to join formal issue on one of the defendant's several pleas.

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| 170  | 322  |
| 96a  | *493 |
| 170  | 322  |
| 102a | *574 |
| 170  | 322  |
| 109a | *810 |

7. INSTRUCTIONS—*when instruction is properly refused.* An instruction which concerns a question of fact involved in other instructions given for both parties may be refused.

8. BILLS AND NOTES—*whether guaranty was written on note when endorsed, or is afterward authorized, is immaterial.* Whether a guaranty is written on a note before the guarantor attached his signature, or whether he first signed his name and then authorized the guaranty to be afterward written over his signature, is immaterial.

*Kaestner v. First Nat. Bank*, 68 Ill. App. 460, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

This is an action of assumpsit, brought by the appellee against the appellants, composing the firm of Chas. Kaestner & Co., as guarantors upon a note for \$3000.00, dated Chicago, November 12, 1892, executed by the Coleman & Ames White Lead Company, by George J. Williams, its manager and vice-president, payable three months after date to the order of Chas. Kaestner & Co., with interest at six per cent per annum, at room 218 First National Bank. The endorsements upon this note are as follows:

“Chas. Kaestner & Co.

“For value received we do endorse and assign this note to First National Bank, Chicago, Ill., and do further hereby guarantee the payment of the same at maturity or at any time thereafter, with interest at seven per cent per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same.

GEORGE J. WILLIAMS,

CHARLES KAESTNER & Co.”

Upon the trial in the court below, the plaintiff introduced in evidence another note for \$3000.00 dated Chicago, August 9, 1892, executed by the said Coleman & Ames White Lead Company, payable three months after date to the order of Chas. Kaestner & Co. at room 218 First National Bank; upon the back of which note were the following endorsements:

"Chas. Kaestner & Co.

"For value received guarantee the payment of the within note at maturity, or at any time thereafter, with interest at seven per cent per annum until paid; and further agree to pay all costs and expenses incurred in collecting the same, waiving notice, protest and diligence.

CHAS. KAESTNER & Co."

The last note, dated August 9, 1892, was taken up with the proceeds of the note here in dispute, dated November 12, 1892. Appellants, by plea under oath, denied the execution of the guaranty sued upon. They also filed a plea of want of consideration, to which no replication was filed by appellee.

A verdict was rendered in favor of appellee for the face of the note with six per cent interest from its date, and after motions of the appellants for a new trial and in arrest of judgment were overruled, a judgment was rendered upon the verdict. This judgment has been affirmed by the Appellate Court. The present appeal is prosecuted from such judgment of affirmance.

REMY & MANN, for appellants.

ORVILLE PECKHAM, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

*First*—Counsel for appellants claim, that the question of paramount importance in this case was a question of fact, namely: whether the guaranty sued upon was written on the back of the note at the time Hecht, one of the appellants, wrote the firm name of Kaestner & Co. thereon. So far as this question of fact was concerned, there was great conflict in the testimony. Such being the case, the judgment of the Appellate Court, affirming the judgment of the circuit court, is conclusive as to such question.

*Second*—It is contended by the appellants, that the court below improperly admitted in evidence the note dated August 9, 1892, and the guaranty endorsed thereon.



A plea of want of consideration was filed by the appellants. The testimony tends to show, that the note, dated August 9, 1892, was owned by the American Exchange National Bank, and came due about the time the note dated November 12, 1892, was executed. The appellants were liable as guarantors upon the note dated August 9, 1892. The testimony shows, that the note, dated November 12, 1892, guaranteed by George J. Williams and Chas. Kaestner & Co., was negotiated at the First National Bank of Chicago for the purpose of taking up and paying the note, dated August 9, 1892. Therefore, the appellants received the benefit of the note upon the guaranty of which this suit is brought, the money raised upon it having been applied to the discharge of a previous indebtedness, upon which they were liable. Hence, the introduction of the note, dated August 9, 1892, in evidence tended to show, that there was a consideration for the contract, on which the suit at bar was brought. Consequently, there was no error in admitting in evidence the note, dated August 9, 1892. Upon the cross-examination of Hecht, one of the appellants, he stated in answer to a question by plaintiff's counsel, that the note dated August 9, 1892, was given for machinery sold by Chas. Kaestner & Co. to the Coleman & Ames White Lead Company. It is objected by the appellants, that the question thus asked upon the cross-examination was improper, and that the evidence called out by it was incompetent. While the consideration of the note, dated August 9, 1892, was not very material, at the same time the proof thus called out on cross-examination was simply in explanation of the whole transaction, and could not possibly have done the appellants any harm.

*Third*—Appellants moved to strike out the guaranty because of an alleged variance between the note and the declaration. This motion was overruled, and exception was duly taken. The guaranty, upon which this suit is brought, was signed by George J. Williams and Chas.

Kaestner & Co. There were only two parties who signed the guaranty, to-wit: the firm of Chas. Kaestner & Co., who are the appellants herein, and George J. Williams. On a joint and several promissory note, made by one of the members of a firm in the partnership name, and by another person in his individual character, a suit may be maintained against the members of the firm without joining the other maker, they, for this purpose, being considered as being one person. (*VanTyne v. Crane*, 1 Wend. 524).

The variance, which is claimed to exist, consists in the fact, that the declaration avers, that the defendants "then and there guaranteed," etc., instead of saying that the defendants, *together with one Williams*, "then and there guaranteed," etc. Although the guaranty was signed by Williams and Kaestner & Co., this suit is against Kaestner & Co. alone, and not against Williams who was not joined in the suit. Section 3 of our statute in relation to joint rights and obligations, being chapter 76 of the Revised Statutes, provides, that "all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants." Where a note is joint and several, it is competent, under our statute, for the holder to resort to either maker for payment. (*Marine Bank of Chicago v. Ferry's Admrs.* 40 Ill. 255). On a joint and several obligation executed by more than two persons, one or all may be sued. (*Cummings v. People*, 50 Ill. 132). In *Gage v. Mechanic's Nat. Bank of Chicago*, 79 Ill. 62, we held, that, where the payees of a promissory note endorsed on the back of it, "For value received we guarantee the payment of the within note at maturity," they become jointly and severally liable to pay the note at maturity, and that, in such case, each of the guarantors is bound to pay the note according to its tenor and effect, and that the holder can bring suit against either of the guarantors. Therefore, in the present case, the appellee had a right to sue the firm of Kaestner & Co. upon the guaranty without joining in such suit George J. Williams,

the other guarantor. Inasmuch, therefore, as Kaestner & Co. were severally liable, independently of the liability of Williams, it was sufficient in the declaration to make an averment, which set up the legal liability of the appellants alone. To have set up that they executed the guaranty together with one Williams, instead of alleging an execution of it by themselves alone, would have been to set up an immaterial detail of the contract. The omission of any reference to Williams, as having guaranteed the note with the appellants, did not prejudice the appellants. We are, therefore, of the opinion, that there was no variance between the declaration and the note and guaranty introduced in evidence in the respect claimed; and that the trial court committed no error in overruling the motion to strike out the guaranty because of such supposed variance.

*Fourth*—Appellants, at the close of the testimony upon the trial in the court below, asked the court to instruct the jury to find a verdict for the defendants. This the court refused to do. Exception was taken to such refusal, and the same is here urged as error. The ground, upon which such refusal is claimed to have been erroneous, is that the appellants filed a plea of want of consideration for the guaranty; that no replication was filed to this plea; and that, therefore, the plea stood admitted on the record and constituted an absolute defense to the action. This position is not well taken, because the omission of the plaintiff below to join formal issue upon the plea of want of consideration by filing a replication thereto, was waived when defendants went to trial without objection upon this ground. The attention of the trial court was not called to the fact, that no replication had been filed to the plea in question. Where several pleas are pleaded, one of which is unanswered, and the parties go to trial without any objection on the part of the defendant that such plea remains unanswered, the objection will be considered as waived, or the irregular-

ity will be cured by the verdict of the jury. (*Ross v. Reddick*, 1 Scam. 73; *Shreffler v. Nadelhoffer*, 133 Ill. 536; *Strohm v. Hayes*, 70 id. 41). There was, therefore, no error in refusing to instruct for the defendants.

The appellants asked the court to instruct the jury, that, unless they believed from a preponderance of the evidence that, at the time the firm name of the defendants was written upon the back of the note in dispute, the stamped guaranty was then upon the note, they should find a verdict for the defendants. This instruction was refused, and its refusal is claimed to have been erroneous. The question whether the guaranty was upon the note when appellants wrote their firm name thereon the second time, or whether the guaranty was written over the firm name after it was signed, was a question of fact which was involved in other instructions given both for the plaintiff and for the defendants. There was, therefore, no error in refusing the instruction the refusal of which is complained of. For instance, one of the instructions given for the defendants was as follows: "The burden of proof is upon the plaintiff to show by the greater weight of the testimony that the defendants executed the guaranty upon the back of the note." If they executed the guaranty upon the back of the note, it was immaterial whether they signed the guaranty after it was stamped upon the note, or whether they signed their firm name and then authorized the guaranty to be afterwards written over such name.

Several technical objections are made to some of the instructions, but we do not regard them as of sufficient importance for further notice. The instructions given submitted the case to the jury fairly and with sufficient accuracy.

The judgments of the Appellate and circuit courts are affirmed.

*Judgment affirmed.*

FLOYD EPLING *et al.*

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| 204 | *195 |

v.

JOSEPH DICKSON, Receiver, *et al.**Opinion filed December 22, 1897.*

1. **EMINENT DOMAIN**—*constitution provides a lien for protection of property owners.* Section 2 of article 13 of the constitution, which provides that private property shall not be taken or damaged for public use without just compensation, has the effect of giving a lien to the property owner for his protection, and secures to the owner his right to compensation until the same has been paid.

2. **SAME**—*rights of property owners are protected as against subsequent purchasers.* Where an owner of property abutting upon a street on which a railroad is constructed has reduced his claim for damages to judgment, his rights will be protected, under section 2 of article 13 of the constitution, as against subsequent purchasers or mortgagees of the railroad property.

3. **LIMITATIONS**—*when five-year limitation concerning actions for damages to property does not apply.* Section 15 of the Limitation act, (Rev. Stat. 1874, p. 675,) relating to the five-year limitation concerning actions for damages to property, has no application to a proceeding in equity to enforce against subsequent purchasers and mortgagees of a railroad, judgments previously recovered by owners of property for damages caused by the construction and operation of the railroad.

4. **JUDGMENTS AND DECREES**—*condemnation judgment may be enforced at any time within twenty years.* The fact that an ordinary judgment ceases to be a lien on land after seven years, does not prevent property owners who have recovered judgments against a railroad for damages to their property from its construction upon the street on which their property abutted, from enforcing such judgments, at any time within twenty years, by an intervening petition in a proceeding in equity to sell the railroad to pay claims of creditors and for foreclosure.

5. **INTEREST**—*judgments for damages to private property taken for public use draw interest.* Section 3 of the act on interest controls judgments for damages to private property taken or damaged for public use, the same as it does other judgments therein mentioned.

6. **DAMAGES**—*costs incurred in obtaining judgment for damages to private property are part of the judgment.* Costs incurred by a property owner in obtaining a judgment for damages to his property taken or damaged for public use are a part of the judgment, and must be allowed as part of the just compensation to which he is entitled.

*Dickson v. Epling*, 61 Ill. App. 78, reversed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

The appellants, Floyd Epling and others, were owners of different lots abutting on a street in the town of Waverly on which the tracks of the St. Louis, Jerseyville and Springfield Railroad Company were constructed. After the track was finished the appellants brought separate actions at law for the injury to said lots, and on June 20, 1882, recovered judgment against the railroad company for various sums. Executions were issued on all of the judgments and returned *nulla bona*. In 1888 the St. Louis, Alton and Springfield Railroad Company acquired the railroad property, franchises, etc., of the St. Louis, Jerseyville and Springfield Railroad Company, and executed a first mortgage thereon to the Farmers' Loan and Trust Company and a second mortgage to the Atlantic Trust Company, both mortgages being to secure certain of its bonds issued to said trust companies, respectively. In October, 1890, B. F. Johnson and others filed a bill in chancery in the circuit court of Sangamon county, alleging said St. Louis, Alton and Springfield Railroad Company was indebted to them for work done and material furnished, etc., upon the road, and praying for liens and equitable relief, etc. Joseph Dickson was appointed receiver in the course of proceedings under this bill, and the railroad property placed in his hands to be operated and administered under the order of the court. The mortgagees before named filed intervening petitions in the cause, asking decrees of foreclosure and sale of the property. The appellants also filed intervening petitions, in which they allege their judgments have not been paid and are liens upon the property in the hands of the receiver, and prayed for an order requiring the receiver to pay the same, with interest and costs, and that he be restrained

from using and operating the railroad along and upon said street until such payment be made.

Upon a hearing the circuit court held a lien existed upon such property in favor of the appellants for the amount of damages inflicted upon their property, respectively, by the construction of the road, and that it was superior and paramount to the rights of subsequent purchasers, mortgagees and creditors, and was not defeated by the Statute of Limitations. To reverse this decree an appeal was prosecuted to the Appellate Court, where the decree was reversed and the cause remanded, with directions to dismiss appellants' petitions. To reverse that judgment appellants, the intervening petitioners, have appealed.

WILLIAM L. GROSS, for appellants.

STEVENS & LANPHIER, ELENEIOUS SMITH, and EDWARD S. ROBERT, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

As has been seen, after the appellants obtained judgment for damages to their property against the St. Louis, Jerseyville and Springfield Railroad Company, another corporation, the St. Louis, Alton and Springfield Railroad Company, acquired the property and franchise of the first named company, and executed two mortgages, one to the Farmers' Loan and Trust Company and another to the Atlantic Trust Company, and the question presented by the record is, whether appellants are entitled to priority in the payment of their judgments, as against the mortgagees, out of the fund arising from the sale of the railroad property on the foreclosure of the two mortgages.

Section 2 of article 13 of the constitution provides that private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the State, shall be ascertained by a

jury as shall be prescribed by law. Here appellants' property was damaged by the construction of the railroad, within the meaning of the constitution, and the several lot owners abutting on the street where the railroad was constructed reduced their damages to judgment, and under the constitution their rights were preserved even as against subsequent purchasers of the railroad property. This was settled in *Penn Mutual Life Ins. Co. v. Heiss*, 141 Ill. 35. That was a case in its facts quite similar to the one here involved, and in the discussion of the question whether a claim for damages could be defeated where the railroad had passed into the hands of another railroad company, it is among other things said (p. 62): "As we have seen, it is not in the power of the railroad, by alienation or otherwise, to defeat this constitutional guaranty, and the alienee, purchaser or successor will be required to take notice of the provisions restricting the power to take or damage private property for public use, and be held to take subject to the burthen cast upon the railroad by, through or under which the interest is acquired."

It is, however, claimed that appellants are barred by the Statute of Limitations, section 15 of which reads as follows: "Actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property, or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." (2 Starr & Curtis, p. 1552.)

If this were an action at law to recover damages against the railroad company, and more than five years had intervened after the damages had been sustained before the action was brought, the statute might be relied upon as a bar to the action, as was held in *Chicago and Eastern Illinois Railroad Co. v. McAuley*, 121 Ill. 160. But here an



action at law to recover the damages was brought and judgment rendered within five years from the time the railroad was constructed and the damages were sustained. This is not an action to recover damages for an injury done to property, within the meaning of the Statute of Limitations, but, on the other hand, the proceeding is one to enforce payment of a judgment heretofore rendered in an action to recover damages to property sustained by the construction and operation of a railroad, and the five year statute of limitations has no application to a proceeding of this character. It is true that, under section 1 of the act on judgments, decrees and executions, in an ordinary case a judgment will cease to be a lien on real estate of the person against whom it may be rendered, upon the expiration of seven years from the date of the judgment; but that does not deprive appellants of the right to enforce payment of their judgments, in a proper proceeding, after the expiration of seven years. Section 26 of the Limitation act provides: "Judgments in any court of record in this State may be revived by *scire facias*, or an action of debt may be brought thereon within twenty years next after the date of such judgment, and not after." Under this section of the statute appellants' judgments were not barred after seven years, but an action of debt might be brought upon them or they might be revived by *scire facias* at any time within twenty years.

The fact that the right of a judgment creditor to enforce collection of a judgment by execution may be limited to seven years, and that period having elapsed in this case, does not, in our opinion, cut off all equitable right of appellants, and deprive them of all remedy to enforce their rights in a proceeding in a court of equity like the one in question. The lien relied upon here is conferred by the constitution in language not of doubtful meaning. As has been said, that instrument declares: "Private property shall not be taken or damaged for public use without just compensation." This provision

of the constitution provides a lien for the protection of the property owner. It confers security on the property owner to his property until compensation has been made. The lien or right conferred on the property owner does not depend upon any equitable proceeding or whether an execution may or may not be issued, but it rests upon a principle engrafted on the organic law,—that the property of the private citizen shall not be taken or damaged for public use without just compensation. Here the appellants, as they had the right to do, had their damages ascertained in the manner provided by law. These damages were reduced to judgment, and no reason is perceived why their judgments may not be enforced at any time within twenty years from the time when rendered.

In the enforcement of the lien upon the railroad property no execution was required in the hands of an officer. Appellants, after their damages had been reduced to judgment, made an effort to collect their judgments by execution; but in this they failed, and their executions were returned no property found. The St. Louis, Jerseyville and Springfield Railroad Company continued to operate its line of road until May, 1888, when the railroad was sold under a decree of the Circuit Court of the United States for the Southern District of Illinois, and passed into the hands of the St. Louis, Alton and Springfield Railroad Company. This company went into possession of the line of road and continued to operate it, but the damages appellants had sustained by the construction and operation of the road were not paid; but two years after the road had passed into the hands of the latter company, appellants, finding the line of railroad and all of the property of the company under the control of a court of equity and about to be sold for the payment of creditors, intervened, and, invoking the equitable powers of the court, asserted the right to the compensation guaranteed by the constitution. In the intervening petition will be found all the averments required in a *scire facias*

to revive a judgment, and if it was necessary to protect the equities of appellants, a court of equity might, as suggested by counsel, regard the petition of the intervening petitioners as in effect an application for an equitable revival of their judgments. But, independently of that view, we think, as appellants' judgments were not barred by any statute of limitations, they were entitled, when a court of equity had in its hands the assets of the railroad company for distribution, to come in and receive the compensation they were entitled to under the constitution.

The court, in its decree, allowed appellants a recovery for the face of the several judgments but refused to allow interest on the judgments, and also refused to allow the costs for which judgment was recovered on the several judgments. Section 3 of chapter 74 of the statute (1 Starr & Cur. 1359,) in force at the date of the rendition of the several judgments, provides that judgments shall draw interest at the rate of six per cent per annum from the date until satisfied. No exception is made in the statute where a judgment has been rendered as compensation for lands taken or damaged for public use, and in the absence of an exception the statute which controls judgments in other cases must control here. Moreover, it has often been held that a final judgment for the amount found to be due as just compensation will draw interest. *Cook v. South Park Comrs.* 61 Ill. 115; *City of Chicago v. Palmer*, 93 id. 125.

The circuit court also held that the costs for which appellants obtained judgment against the railroad company when they obtained their several judgments for compensation was no part of the just compensation, within the meaning of the constitution, and no recovery could be had for such costs. Where private property is taken or damaged for public use, just compensation cannot be made to the property owner if he is compelled to prosecute in the courts for his just rights at his own costs. The costs in the present case followed the several judg-

ments. They were a part and parcel of the judgments, and we see no reason why appellants were not entitled to a decree for the costs as well as for the rest of their judgments.

The judgments of the Appellate and circuit courts will be reversed and the cause remanded to the circuit court, with directions to enter a decree in favor of appellants, in conformity to the views here expressed.

*Reversed and remanded.*

Mr. JUSTICE BOGGS, having passed upon this case in the Appellate Court, took no part in this decision.

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## THE CITY OF CHARLESTON

v.

ISAIAH H. JOHNSTON *et al.*

*Opinion filed December 22, 1897.*

1. STATUTES—*act adopting another statute by reference adopts it as it then existed.* An act adopting, by reference, the whole or part of another act adopts such act as it then existed, and does not include subsequent additions or modifications of the act so adopted, in the absence of expressed or strongly implied intent.

2. SPECIAL ASSESSMENTS—*act of June 17, 1893, is not an independent act.* The act on special assessments approved June 17, 1893, (Laws of 1893, p. 78,) is not an independent act, but must be regarded as an amendment of the special assessment acts of 1887 and of 1891, (Laws of 1887, p. 104; Laws of 1891, p. 81,) amending article 9 of the City and Village act. (Rev. Stat. 1874, p. 232.)

3. DRAINAGE—*adoption of article 9 of City and Village act by Drainage act of 1885 does not include amendments.* The adoption of the provisions of article 9 of the City and Village act by section 3 of the Drainage act of 1885, (Laws of 1885, p. 60,) includes only such provisions of that article as then existed, and does not include the subsequent amendments of that article by the special assessment acts of 1887, 1891 and 1893.

4. SAME—*assessment for drainage improvement constructed under act of 1885 cannot be divided into installments.* A special assessment levied to pay for a system of drainage constructed by a city under the

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178 500

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provisions of the Drainage act of 1885 (Laws of 1885, p. 60,) cannot legally be divided into installments nor paid by the issue of bonds.

5. SAME—*amendments of City and Village act do not affect drainage assessments.* The amendments of article 9 of the City and Village act do not affect the manner of levying and collecting drainage assessments for improvements constructed under the Drainage act of 1885, and the same proceedings may be had as were provided for in such article at the time it was adopted by the Drainage act.

6. SAME—*word "drain," used in Drainage act of 1885, authorizes the building of sewers.* The provisions of the Drainage act of 1885, which authorizes the construction of drains, ditches, levees and dykes, are broad enough to include the construction of sewers also.

APPEAL from the County Court of Coles county; the Hon. S. S. ANDERSON, Judge, presiding.

The city council of the city of Charleston having passed an ordinance establishing a drainage district and providing for the construction of a drain therein, as provided in the said ordinance, a petition was filed in the county court of Coles county praying for the assessment of the cost of the improvement, as provided by law, upon the property benefited thereby. Commissioners were appointed and an assessment roll returned to the court, to which numerous objections were filed by property owners. Upon a hearing by the court the objection that the ordinance was invalid because it provided for the division of the assessment into ten installments, and authorized the issue of bonds in anticipation of the payment thereof, was sustained and the petition dismissed. The other objections were overruled. From the order of dismissal the city of Charleston prosecutes this appeal.

Section 1 of the ordinance ordains that certain territory therein described, lying within the corporate limits of the city, shall be improved by a system of drains, as hereinafter provided. Section 13 provides that "the payment of the special assessment for this local improvement shall be divided into ten installments." Section 14 authorizes the corporate authorities to issue bonds in payment of the installments.

W. E. ADAMS, H. A. NEAL, and F. K. DUNN, for appellant.

J. H. MARSHALL, and J. F. HUGHES, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The principal question presented for our decision is, had the municipal authorities of the city power to pass these sections 13 and 14 of the ordinance, so dividing the assessment into ten installments and providing for the issuing of bonds to pay the same? The ordinance was passed under the act of the legislature in force July 1, 1885, which authorized the corporate authorities of cities and villages to construct, maintain and keep in repair drains, ditches, levees, dykes and pumping houses, for drainage purposes, by special assessment upon the property benefited thereby. Section 3 of that act is as follows: "All proceedings for the making of the improvement in this act mentioned, and for the maintenance and repair thereof, and for the levy and collection of the special assessments to defray the cost of the same, shall be in accordance with the provisions of article 9 of the general act for the incorporation of cities and villages, approved April 10, 1872."

It is admitted that article 9 of the act mentioned as in force at the passage of the law in 1885 made no provision for or in any manner authorized the division of special assessments into installments or authorized the issue of bonds to pay such assessments. It was not until the amendment to the act of 1872, passed April 29, 1887, that special assessments could be so divided. We held in *Culver v. People*, 161 Ill. 89, that by section 3 of the act passed May 2, 1873, authorizing the improvement of parks and boulevards by special assessment, which provided that the proceedings to levy and collect assessments should in all things conform to the provisions of this same article 9, the language of which is not materially

different from that above quoted of the act of 1895, the legislature intended to adopt only the provisions of said article 9 as it existed in 1873, when the Park and Boulevard act was adopted, and not as it might be thereafter changed, and therefore the corporate authorities of West Chicago had no power, by ordinance passed March 28, 1893, under the act of May 2, 1873, to provide for the collection of an assessment for the improvement of a boulevard, in installments. The decision in that case is based upon the rule that "an act which adopts by reference the whole or a part of another statute, means the law as existing at the time of the adoption, and does not include subsequent additions or modifications of the statute so adopted, unless it does so by expressed or strongly implied intent," as laid down by Endlich on Interpretation of Statutes. (See, also, other authorities cited in that opinion.)

If authority for the passage of sections 13 and 14 of this ordinance depends upon any amendment to article 9 passed since the act of 1885, the *Culver case* is decisive against the validity of those sections. This we do not understand counsel for appellant to gainsay. But they insist that the power exercised in the passage of those sections is expressly given by the act of June 17, 1893, which they say is not an amendment to article 9, "but is an independent act, covering all cases of special assessment authorized by any law of this State." If the act of 1893 had purported, by its title or its language, to be an amendment to the amendments of 1887 and 1891, there could have been no room for this contention. We held, however, in *English v. City of Danville*, 150 Ill. 92, that while the act did not on its face profess to amend article 9 or any section thereof, but on its face appears to be an independent act, yet from a consideration of its terms and provisions it should be regarded as an amendment to the act of 1887 as amended by the act of 1891, and we said (p. 95): "It relates to the same subject matter, and, in

effect, changes the sections of the act of 1887 relating to the collection of special assessments in installments, providing for seven installments where the old act only provided for five, and it contains a provision for the issue of bonds to supersede the issue of vouchers provided for under the old act. The mere fact that the act does not, in its title, profess to amend article 9 is unimportant. If the later act made a change in the mode of procedure, the later act may be regarded as an amendment to the other." On the authority of this case it was recently held in *Latham v. Village of Wilmette*, 168 Ill. 153, that the act of 1893 was but an amendment to that of 1891, and that the two statutes should be construed together.

But aside from these decisions, if the rule above quoted from Endlich on Interpretation of Statutes be adhered to and applied to this case, it seems clear that the statute of 1893 does so change that of 1872 as to provide an entirely different method of collecting special assessments from that authorized by the old act. Under it assessments could only be collected as a whole, and not in parts, and no bonds could be issued in payment of the assessment, whereas it is now lawful for corporate authorities to divide the assessment into payments or installments to bear interest, and also to issue bonds. It cannot be said that these subsequent additions or modifications of the act as adopted April 10, 1872, were included in the adoption of section 3 of the statute of 1885, under the ruling of the *Culver case*. Article 9, as adopted April 10, 1872, still authorizes the same proceedings for the levy and collection of the special assessment to defray the costs of an improvement under the act of 1885 as might be had under said article 9 as it stood at the time of the adoption of the latter act. The question here is, shall those provisions be followed, or can the municipal authorities elect to adopt the mode authorized by the act of 1893? In other words, does the language of section 3 of the act of 1885 adopt these subsequent additional meth-



ods, so as to give the municipal authorities the discretion of adopting one or the other of the methods? *Culver v. People, supra*, is conclusive that it does not.

It is also contended by appellees, that even if the assessment could be lawfully divided into installments, not more than seven could be legally made. The act of 1893 authorizes the division of an assessment for building sewers into not to exceed ten installments. But it is contended this ordinance does not provide for building a sewer; also that the act of 1895 does not authorize the construction of sewers. It is true that sewers are not expressly mentioned, either in the title or body of that act; but the meaning of the word "drain" is broad enough to include sewers, and, in numerous proceedings under that statute, some of which have come before us for review, has been so construed and acted upon. (*Village of Hyde Park v. Spencer*, 118 Ill. 446; *Pearce v. Village of Hyde Park*, 126 id. 287; *Rich v. City of Chicago*, 152 id. 18.) We entertain no doubt that the statute authorizes the construction of drains, to be used as sewers, by a proper ordinance, and we are inclined to the opinion that the ordinance in question may properly be construed as one providing for the construction of sewers, although it is not altogether clear in that regard.

The discussion of objections filed to the confirmation of the assessment, other than those considered, is aside from the record. As above stated, they were each overruled by the county court. No exception was taken to that ruling, neither are cross-errors here assigned. The court's decision upon these objections is not, therefore, before us for review, for the reason above stated.

The principal objection was properly sustained, and the judgment of the county court will accordingly be affirmed.

*Judgment affirmed.*

DANIEL F. RICE

v.

ANTHONY SILVERSTON.

*Opinion filed December 22, 1897.*

**FRAUD**—*when conveyance will be set aside for fraud.* A deed to a farm exchanged for worthless notes and a deed of trust upon property to which the maker thereof had no title will be set aside in equity, where it appears that the land given in exchange was situated in another State, and that the grantee in the deed to the farm had caused the notes and trust deed to be executed by parties who had no interest in the land, to aid in his fraudulent scheme, and that by artifice and deceit he induced the grantor to rely upon his representations and upon the papers purporting to convey title.

APPEAL from the Circuit Court of Jefferson county;  
the Hon. E. D. YOUNGBLOOD, Judge, presiding.

C. H. PATTON, and SIM T. PRICE, for appellant.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellant, Daniel F. Rice, filed his bill in the circuit court of Jefferson county to enjoin appellees, Anthony Silverston and Emily, his wife, from conveying or encumbering certain lands, containing about four hundred and fifteen acres, situated in said county, which had been by deed conveyed by appellant to said Emily, and to set aside said deed because of the alleged fraud of said Anthony in procuring the same. Said deed had been filed for record in the recorder's office, and the recorder was also made a party defendant, to enjoin him from filing or recording any deed or mortgage of said lands of said Silverstons, or either of them. A temporary injunction was granted, but upon the final hearing, upon the amended bill, answer and replication, depositions and oral and documentary evidence, the injunction was dissolved and the bill dismissed. This appeal was then taken by Rice, the complainant, and the injunction continued in force until the further order of the court.

The only question is, whether or not Anthony Silverston obtained said deed to his wife, Emily, from Rice by fraud and deceit. The deed was made to said Emily at the instance of said Anthony, without any participation by her in the transaction, and, so far as the record discloses, for purposes of his own convenience. The farm in question was situated near Mt. Vernon, in said county, and was worth about \$9000. The evidence tended to prove that Rice, being desirous of selling the farm, proposed to one Wirt, a real estate agent in Mt. Vernon, to pay him all over \$8500 which he, Wirt, could obtain for the property on a sale. Wirt saw an advertisement in a St. Louis paper of some notes, secured by deed of trust, for sale or exchange for real estate, and through correspondence the owner, who proved to be the appellee Anthony Silverston, came to Mt. Vernon to negotiate with Rice for an exchange of the notes and deed of trust for the latter's farm. Rice afterward also met Silverston in St. Louis, and negotiations were had at both places, which resulted in an option agreement, signed by the parties, and later the exchange of the notes and deed of trust for the farm, as proposed. The notes and deed of trust were worthless, and the evidence was sufficient to show that Silverston knew that fact, and was a party to a fraudulent scheme, concocted by himself and others, for the issue of these notes and deed of trust by a fictitious or irresponsible person upon 1280 acres of land in Clay county, Kentucky, which was of but little value and to which the maker of the deed of trust had no title. Rice became the victim of this fraudulent scheme.

This tract of 1280 acres was a part of a large grant of 50,000 acres, which grant was made by the Governor of Virginia to Benjamin Wyncoop in 1786. It appears that in 1856 Benjamin Wyncoop, Jr., made a deed of the 50,000 acres to one Carroll, and that that title, by *mesne* conveyances, went to Lewis Wheelock in 1893, who exchanged the 1280 acres of the tract with Silverston for the equity

of redemption, of merely nominal value, in certain real estate in St. Louis. The Wyncoop title to the 50,000 acres had been wholly extinguished in 1840 by conveyances to Walker and others, so that the deed of Benjamin Wyncoop, Jr., to Carroll, in 1856, and from which Wheelock traced his title, conveyed nothing. By arrangement between Wheelock and Silverston, Wheelock's title to the 1280 acres, which was of no value, was conveyed to McKee, who was in business with Silverston, for the expressed consideration of \$18,000, and Silverston conveyed in exchange his title, of little or no value, to the St. Louis lots to Maggie Raleigh, Wheelock's employee, at Wheelock's request, for the expressed consideration of \$24,000, Miss Raleigh giving back a mortgage of \$5000, which Wheelock testified made the difference. Silverston then procured McKee to convey the 1280 acres by deed of general warranty, dated October 23, 1895, to John Foster, for the expressed consideration of \$19,200, and Foster gave back the note of \$8900 and the three interest notes of \$534 each, and the deed of trust on the 1280 acres securing the same, which being transferred to Silverston, were by him exchanged for appellant's farm. The evidence shows that Maggie Raleigh, McKee and Foster were mere dummies, employed, respectively, by Wheelock and Silverston in the transaction between themselves, and the purpose of Silverston was to create promissory notes aggregating upwards of \$10,000, secured by deed of trust on said real estate, appearing from the face of the papers to be worth nearly double that amount, when in fact said notes were of no value whatever.

Silverston presented to Rice, during the negotiations, a purported abstract of title of the Kentucky lands, which appeared to have been certified to by "George & Locke, Investigators of Land Titles," at Louisville, Ky., in 1895, showing on its face a good title to the 1280 acres in Foster when he made the deed of trust. This abstract, while tracing title through the Wyncoop grant, failed

to show the conveyances to Walker and others in 1840, and a deed prior thereto for a part of the tract, which conveyances, as before stated, entirely extinguished the Wyncoop title, which title it is pretended passed, by successive conveyances as to the 1280 acres, to Foster. The evidence showed that there were no such persons or firm as "George & Locke" engaged in the business of investigating land titles at Louisville in 1895; that the purported certificate was a forgery, and the names thereto were fictitious and the abstract a fraudulent contrivance, either gotten up at the instance of Silverston, or used by him with knowledge of its fraudulent character, to impose upon the purchaser of the notes and deed of trust. The evidence also tended to show that the plat of the Wyncoop grant of land attached to the abstract, so far as it appeared to have been divided into separate lots and tracts, was fictitious. No effort was made by the defendant to prove the certificate of "George & Locke" was genuine, or that the notes and deed of trust had any actual value, but the defense is that the doctrine of *caveat emptor* applies; that Silverston had no knowledge of the value of the 1280 acres of land or of the condition of the title to it, and so told Rice, and advised him to go to Kentucky and look at the land for himself, and that he made no false or fraudulent representations to Rice to bring about the trade.

This defense cannot prevail. The lands were in a distant State, and while the evidence does not show that Silverston did anything to prevent Rice from going there and looking at the lands before making the trade, but apparently encouraged Rice to make the trip, still, when the parties were negotiating in St. Louis, Silverston produced one Severs, who, Silverston claimed, held the notes and deed of trust as collateral security for a loan and who claimed to be familiar with the lands, and who stated to Rice, in the presence of Silverston, that they were worth \$20 per acre, Silverston insisting at the same time that

they were worth \$25 per acre. The evidence also tends strongly to show that, as an inducement to Rice to make the exchange, he told Rice in Mt. Vernon that he would guarantee that the title was good. But be that as it may, we are satisfied from the proof that the deed to the farm was obtained by Silverston by the use of artifice, deceit and fraud. While pretending that he wished Rice to examine the land for himself and rely upon his own judgment, he succeeded, by indirection, in making Rice believe that such an investigation would not be necessary. While appearing reluctant to give Rice \$500 in addition to the notes for the farm, as Rice demanded, he gave Wirt, whom he recognized as Rice's agent, his note for \$500 to induce Rice to agree to allow him to redeem said notes within one year. As might be supposed, Rice was willing to allow such redemption, and it is apparent that Silverston's purpose was to create in the mind of Rice the belief that these fraudulent papers were of such value that he would not exchange them for the farm unless it was a part of the contract that he could have a year to redeem them. Many other facts and circumstances were shown, not necessary to be set out here, tending to prove fraud on the part of Silverston. Silverston did not produce, and apparently made no effort to produce, McKee, Foster, Severs, or any of the parties to the scheme which resulted in the creation of the notes and deed of trust, and Foster could not, after diligent search on behalf of Rice, be found.

While it is true that prudence on the part of Rice would, under ordinary circumstances, have required him to examine the lands or otherwise to have satisfied himself of their value, and to have ascertained the state of the title, still, in view of the fact that the lands were in another State remote from where he lived, and in view of the artifice and deceit resorted to by Silverston to induce Rice to rely upon his representations and upon the face of the papers and in presenting to him a fictitious

abstract of title, he should not be denied relief in this case on the grounds urged. While the conduct of Rice in the transaction may not have been altogether ingenuous, still we do not find in the record sufficient evidence that he was himself in such fault as to preclude him from relief. He doubtless thought he was making a contract very advantageous to himself, and was anxious to close it without unnecessary delay or opportunity for interference from others; but it is clear that it was a part of the scheme of Silverston to make Rice anxious to close the deal, and there is no principle of equity which we are aware of, which Silverston can invoke, under the facts in this case, to deny to Rice the relief which he seeks.

The decree of the circuit court is reversed and the cause remanded, with directions to enter a decree as prayed in complainant's bill.

*Reversed and remanded.*

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EMANUEL PFEIFFER *et al.*

*v.*

THE PEOPLE *ex rel.* George McCormick, County Collector.

*Opinion filed December 22, 1897.*

1. SPECIAL TAXATION—operation of amendment of 1895 to section 17 of article 9 of City and Village act. The amendment of 1895 to section 17 of article 9 of the City and Village act (Laws of 1895, p. 100,) merely limits the amount of special taxes against contiguous property to the amount they will be benefited by the improvement, and leaves that question to the determination of the court.

2. SAME—amendment of 1895 does not abolish all distinction between special taxation and special assessments. The amendment of 1895 to section 17 of article 9 of the City and Village act does not abolish all distinction between special taxation and special assessments, but takes from the city council the power to conclusively determine for itself the question of benefits.

3. SAME—special taxation ordinance is still *prima facie* sufficient to support the judgment. A special taxation ordinance, and the assessment

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| 185  | 373  |
| 170  | 347  |
| 187  | *402 |
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| 170  | 347  |
| f207 | 551  |
| 170  | 347  |
| 214  | 1518 |

roll thereunder, are *prima facie* sufficient to support a judgment of confirmation entered by default, though no reference to the question of benefits is made in the ordinance.

4. SAME—*objection that property is taxed more than benefited should be made at confirmation.* An objection that property is specially taxed more than it is benefited must be made at the time of application for judgment of confirmation, and comes too late on application for judgment of sale for the delinquent tax.

5. SAME—*when judgment confirming a special tax will be sustained.* Where a special taxation ordinance, and the proceedings thereunder, conform to the law as it stood prior to the amendment of 1895 to section 17 of article 9 of the City and Village act, and judgment has been rendered confirming the tax, the judgment will be conclusive, in a collateral proceeding, that the property was not taxed in excess of the benefits derived from the improvement.

6. SAME—*effect where tax is levied against lots jointly, instead of severally.* The fact that a special tax is levied against two lots, owned by the same party, jointly, instead of severally, will not invalidate the tax in a collateral proceeding, as it will be presumed, in the absence of evidence to the contrary, that some good reason existed for listing them together. (*Howe v. People*, 88 Ill. 288, and *Louisville and Nashville Railroad Co. v. City of East St. Louis*, 134 id. 656, distinguished.)

APPEAL from the County Court of Madison county;  
the Hon. WILLIAM P. EARLY, Judge, presiding.

J. H. & L. D. YAGER, for appellants.

JOHN F. MCGINNIS, and HENRY S. BAKER, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from the judgment of the county court of Madison county ordering the sale of certain lots for delinquent special taxes. The city of Alton had passed an ordinance for the improvement of a portion of Twelfth street, in that city, directing the cost to be raised by special taxation. The proper legal steps were taken, an assessment roll was returned into court, and the same confirmed, no one objecting. Appellants defaulted in the payment of the special tax assessed against their property, and resisted the application of the county collector



for an order of sale. The errors relied on in this court are, both the ordinance and the assessment roll are void.

The objection to the ordinance is, that under section 17 of article 9 of the act for the incorporation of cities and villages, as amended in 1895 by the addition of the proviso, the ordinance should have provided that the special tax levied on any piece of property should not exceed the special benefits which such property would receive from the improvement. That section, as amended, is as follows: "When said ordinance under which said local improvement shall be ordered shall provide that such improvement shall be made by special taxation of contiguous property, the same shall be levied, assessed and collected in the way provided in the sections of this act providing for the mode of making, levying, assessing and collecting special assessments: *Provided*, that no special tax shall be levied or assessed upon any property to pay for any local improvement, in an amount in excess of the special benefit which such property shall receive from such improvement. Such ordinance shall not be deemed conclusive of such benefit, but the question of such benefit and of the amount of such special tax shall be subject to the review and determination of the county court, and be tried in the same manner as in proceedings by special assessments." (Laws of 1895, p. 100.)

The ordinance contained no reference to the question of benefits, but was somewhat loosely drawn, barely conforming to the practice which prevailed under the statute and decisions of this court prior to the enactment of the proviso to section 17, and after providing that the street intersections and crossings should be paid for by general taxation, and that the right of way of the street railway company should be improved at the cost of said company, it then provided that the rest of the improvement should be paid for by a special tax to be levied upon the abutting lots and lands. We are of the opinion that this ordinance would have been sufficient prior to the

amendment of section 17, for, as the law then stood, local improvements could be made and paid for by special taxation of contiguous property without any determination as to benefits, except such as was made by the council in passing the ordinance. (*City of Galesburg v. Searles*, 114 Ill. 217.) The only change introduced by the amendment in question is to limit the amount which may be assessed against any lot or tract to the amount it will be benefited by the improvement, and to make that question a subject for review and determination by the county court. Formerly the ordinance was conclusive as to the question of benefits,—now it is only *prima facie* evidence thereof; and if any land owner is not satisfied with the assessment against his property, he may appear in the county court and show, if he can, that his property has been assessed more than it will be benefited by the improvement. In view, however, of the construction which had been given to the statute by this court prior to the amendment, and from the language of the amendment itself, it seems clear that, where the ordinance and proceedings under it conform to the law as it stood before the amendment was adopted, and judgment has been rendered confirming the assessment, the judgment will be conclusive in a collateral proceeding, as in this case, that the property was not assessed in excess of the benefits to it. The amendment provides that the ordinance shall not be conclusive of the question, but that it shall be subject to the review and determination of the county court. It follows, we think, that the ordinance and assessment are still *prima facie* sufficient to support the judgment, though no reference to the question of benefits be made in the ordinance.

There is nothing in this record to show, and it could not have been shown in this collateral proceeding, that the total amount of the special tax required to be assessed exceeded the total amount of special benefits, and that the council exceeded its powers, and that the ordi-

nance is void for that reason. It is therefore not necessary to decide what the effect of such a showing would be where the ordinance requires the whole cost to be assessed upon the contiguous property. The commissioners were bound to take notice of the statute, whether its provisions were incorporated in the ordinance or not, and in their report in this case they certified, among other things, that they made the assessment in accordance with the statute.

We are referred to *Greeley v. People*, 60 Ill. 19, *Crawford v. People*, 82 id. 557, and other cases, as maintaining the contention of appellants. Those were cases relating to special assessments, and not special taxation, and arose under different statutes.

The statute does not have the effect of abolishing all distinctions between special taxation and special assessments, as contended by counsel, but it takes from the city council the power to conclusively determine for itself the question of special benefits, and makes the question of such benefits and special tax subject to review and determination in the county court.

Nor is the objection well taken that the commissioners did not estimate what proportion of the total cost of the improvement would be of benefit to the public and what proportion to the property benefited. That question had been settled by the ordinance, and as it does not appear that the city council exceeded its powers in passing the ordinance, the judgment of confirmation is not void for the reason alleged. *Watson v. City of Chicago*, 115 Ill. 78.

In *City of Sterling v. Galt*, 117 Ill. 11, it was said (p. 17): "When the cost of a local improvement is to be raised, in whole or in part, by special taxation, the ordinance itself must either state the sum or give the data by which the commissioners can fix the amount to be thus raised, and when so fixed or ascertained, in conformity with the ordinance, it is conclusive on the property owners." And

it was there further said that in cases of special taxation the municipal authorities, if they think proper, may impose the whole burden upon the contiguous property. While this cannot now be done where such tax exceeds the benefits, in view of the amendment to section 17, it may, however, still be done when, as in this case, it does not appear that there is any such excess of the special tax over the special benefits.

In *Newman v. City of Chicago*, 153 Ill. 469, it was held that where the ordinance provided that the improvement should be paid for by special assessment, the commissioners might nevertheless assess a portion of the cost to the city, which would necessarily be paid by general taxation. As the law then stood this could not have been done in a case of special taxation, and whether or not it might now be done, in view of the said amendment, where it is made to appear that the cost of the improvement exceeds the special benefits, is a question not involved here. In this collateral proceeding the judgment of confirmation cannot be attacked unless it is based upon a void ordinance, or is itself void for some other sufficient cause. If the appellants desired to test the question whether their property was assessed more for this improvement than it was actually benefited, they should have filed their objections to the assessment roll before the confirmation, and, as was done in *Illinois Central Railroad Co. v. City of Wenona*, 163 Ill. 288, they could then have contested the question before a jury, if they desired to do so.

The last objection is, that appellant Emanuel Pfeiffer was assessed for lots 7 and 8 the sum of \$375.36, and that appellant Eliza Pates was assessed for lots 1 and 16 the sum of \$236.60; that such method of assessing is contrary to the statute, and therefore invalid. The statute requires that the tax shall be assessed to the several lots, blocks, tracts and parcels of land in the proper proportion. In *Mix v. People*, 116 Ill. 265, it was said (p. 276): "It is objected that some of the lots were assessed jointly,

and not separately, as required by the statute. The presumption should be indulged in favor of the proceedings of the assessor, that the lots were so situated that their value could not be ascertained separately, as, if one building had covered parts of both." In *Moore v. People*, 106 Ill. 376, an assessment on a tract of 420 acres was sustained, the court saying, "the land of appellant was located in the same section, in a body, and for the purposes of this assessment may be regarded as one tract of land,"—citing *Spellman v. Curtenius*, 12 Ill. 409. In 25 Am. & Eng. Ency. of Law (p. 223) it is said: "Where two or more lots or tracts adjoin each other, and are used and occupied as one, they may be assessed as a single tract,"—citing cases in Kansas, California, Iowa, Rhode Island, New Jersey, and other States. There is no showing made that any injustice has resulted to appellants from assessing their lots together, and it will be presumed that there was some good reason for listing them as one tract.

This case is not like that of *Howe v. People*, 86 Ill. 288, where three separate tracts of land, two of them belonging to other parties, were valued and assessed aggregately against Howe. Neither is it like *Louisville and Nashville Railroad Co. v. City of East St. Louis*, 134 Ill. 656, where "parts of blocks 8 and 9 and right of way across Broadway" were assessed a lump sum, and the whole assessment roll showed that the assessments had been made on the property owners, rather than on the property itself.

None of the objections urged can prevail in this proceeding, and the judgment below, being correct, should be affirmed. Judgment will therefore be entered against said lots 7 and 8 in block 30, and said lots 1 and 16 in block 23, in Pope and others' addition to the city of Alton, in the State of Illinois, for the special taxes and costs so assessed against them, respectively,—that is to say, against said lots 7 and 8 for \$375.36 and against said lots 1 and 16 for \$236.60, together with damages on each

of said amounts of five per cent thereof, and costs; and an order will be entered that the respective amounts, if any, deposited with the collector by the respective appellants be credited upon the judgment against their said lots as required by the statute, and that execution issue for the balance, if any, of such judgment, damages and costs. The appellants will pay the costs of this court.

*Judgment affirmed.*

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THE ST. LOUIS, BELLEVILLE AND SOUTHERN RY. CO.

v.

EDWARD C. RICE.

*Opinion filed December 22, 1897.*

APPEALS AND ERRORS—*whether condition in promise to pay barred debt has been performed is a question of fact.* Whether a condition provided for in a conditional promise to pay a barred debt has been performed is a question of fact conclusively settled by a judgment of the Appellate Court affirming that of the trial court.

*St. L., B. & S. Ry. Co. v. Rice*, 69 Ill. App. 244, affirmed.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. B. R. BURROUGHS, Judge, presiding.

G. A. KOERNER, and VICTOR K. KOERNER, for plaintiff in error.

EDWARD L. THOMAS, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was an action of assumpsit by Edward C. Rice, against the St. Louis, Belleville and Southern Railway Company, to recover the sum of \$1500 paid by Rice in 1880, at the request of the defendant below, for the pur-

chase of a certain right of way. The cause was heard by the circuit court of St. Clair county by agreement, without a jury, and a judgment entered for Rice for \$1500. This judgment has been affirmed by the Appellate Court, and the railway company has brought the record to this court for review on error.

The only point made by plaintiff in error is the alleged insufficiency of the proof of the alleged new promise set up by the replication of the plaintiff below to the plea of the Statute of Limitations. No complaint is made to any ruling of the circuit court in holding or refusing to hold any proposition submitted to be held as law in the decision of the case.

It is contended that the alleged new promise was contained in the following resolution of the board of directors of the plaintiff in error:

*"Resolved, That the treasurer be directed to pay to Edward C. Rice, out of the first money coming into his hands as the proceeds of the company's bonds, the sum of \$1500 in payment of the amount advanced to the company by said Rice for the purpose of purchasing a right of way along the St. Clair county turnpike, the said Rice to accept said sum as in full of all his claims upon or against this company, and that the secretary be directed to inform Mr. Rice that this company acknowledged the indebtedness."*

And it is further insisted that the promise was a conditional one. Even if this be conceded, it is a sufficient answer to say that the question whether the condition had been fulfilled was one of fact, which has been conclusively settled against plaintiff in error by the judgment of the Appellate Court, and that no question of law has been preserved for our decision.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## MARY C. MEADOWCROFT

v.

D. H. KOCHERSPERGER, County Treasurer, *et al.**Opinion filed December 22, 1897.*

1. EQUITY—one seeking to enjoin assessment as excessive must offer to pay what is due. A bill in equity to vacate a judgment confirming a special assessment and enjoin the collection of the assessment because it exceeded the amount named in the notice sent by the commissioners, with which amount the complainant was satisfied and therefore allowed judgment by default, is properly dismissed where complainant makes no offer to pay the amount named.

2. SAME—one must complain in apt time of defects not apparent of record. A property owner who has notice of a confirmation judgment, fair upon its face, shortly after its entry, will not be permitted to wait until the improvement is completed and then have the judgment vacated in equity and the collection of the assessment enjoined, on the ground that the notice of the assessment sent by the commissioners was for less than the judgment entered, which fact was not apparent of record.

APPEAL from the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

MAHER & GILBERT, for appellant.

WILLIAM G. BEALE, Corporation Counsel, and WILLIAM H. ARTHUR, Assistant, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellant filed in the Superior Court of Cook county her bill of complaint in this case against the appellees, the county treasurer of said county and the city of Chicago, to vacate and set aside a judgment of the county court confirming a special assessment, and to perpetually enjoin the collection of said assessment upon certain lots owned by her adjacent to Homan avenue, in the city of Chicago, for curbing said avenue with curb-stones and grading and paving the same with asphalt. The sole



ground for relief alleged in the bill was that the notice of the assessment sent to her by mail by the commissioners, and received by her, stated the amount of the assessment to be \$374.72 while the amount assessed was \$1873.60, and being satisfied with the amount named in the notice, and willing to pay the same, she did not appear and the judgment was taken by default. The Superior Court sustained a demurrer to the bill and dismissed it for want of equity.

The court was right in sustaining the demurrer and dismissing the bill under at least two well established rules of equity. In the first place, complainant did not offer to do equity by paying the amount named in the notice sent to her, to which amount she did not claim that the judgment against her was not equitable. She alleged in her bill that she did not appear because she was willing to pay an assessment of \$374.72 named in the notice. If the judgment had been entered for that amount she made no claim that she would not have been bound by it. It is claimed that she is relieved from paying anything because of an averment in her bill that her real estate had not been enhanced in value by the improvement; but that affords no reason for not paying the amount for which she admits the court had a right to enter the judgment. Equity will not grant relief against an assessment unless the complainant pays such portion as is justly due. (1 Pomeroy's Eq. Jur. sec. 393.) In the second place, the judgment of confirmation was entered June 14, 1893, and complainant had notice of it six months afterward, but did nothing to assert any supposed equity until she filed this bill after the county treasurer had applied for judgment against her lands as delinquent, at the July term, 1895. The special assessment was the fund relied upon to pay for the improvement, and it appears from the averment of the bill that the improvement had not enhanced the value of complainant's property, that the work had been completed and the necessary expense incurred. For

aught that appears this work was done after she had notice of the judgment. The record of the judgment was fair on its face, and the city was entitled to rest secure in the belief that it was regular and valid. If it was not so for any reason known to complainant, it would be inequitable to allow her to lie by until the improvement was made and then for the first time make known a defect not apparent in the record.

The decree of the Superior Court will be affirmed.

*Decree affirmed.*

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JOHN A. MARKLEY

v.

THE CITY OF CHICAGO.

*Opinion filed December 22, 1897.*

1. **APPEALS AND ERRORS**—*when rule that objections not raised below are waived does not apply.* The rule that objections not raised below, except jurisdictional questions, are waived, does not apply where a judgment confirming a special assessment is rendered by default.

2. **SAME**—*judgment by default may be reviewed by writ of error.* A judgment rendered by default may be reviewed by writ of error as to alleged errors appearing on the face of the record.

3. **SPECIAL ASSESSMENTS**—*commissioners appointed to estimate cost must act jointly.* Commissioners appointed to estimate the cost of an improvement must act jointly; and it is a fatal objection, in a direct proceeding to review a judgment confirming a special assessment, that the report of the commissioners was signed by two, only, of the three commissioners appointed, and by a third person not authorized to act.

WRIT OF ERROR to the County Court of Cook county;  
the Hon. FRANK SCALES, Judge, presiding.

RICH & STONE, and RANDALL W. BURNS, for plaintiff  
in error.

CHAS. S. THORNTON, Corporation Counsel, and JOHN  
A. MAY, for defendant in error.

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| 170 | 358  |
| 177 | 170  |
| 170 | 358  |
| 186 | *80  |
| 170 | 358  |
| 188 | *164 |

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was a writ of error sued out to reverse the judgment entered by the county court of Cook county confirming a special assessment upon the property of the plaintiff in error and others, for the purpose of curbing, grading and paving Calumet avenue from Fifty-first to Fifty-fifth street, in the city of Chicago. Judgment was rendered against the plaintiff in error by default.

It appeared from a copy of the ordinance attached to the petition that the city council appointed J. S. Sheehan, George H. Waite and G. D. Purinton commissioners to estimate the cost of the proposed improvement. The report of the commissioners attached to said petition was signed by said Sheehan and Purinton and one M. D. Lewis as commissioners, and was not signed by the said George H. Waite. It is assigned for error the estimate was not signed by the commissioners appointed by the city council to perform that duty. In the case of *Adcock v. City of Chicago*, 160 Ill. 611, and *Moore v. City of Mattoon*, 163 id. 622, we held that the three commissioners appointed to make an estimate of the cost of an improvement to be made by special assessment must act jointly, and that the action of two of them only was a fatal error in the proceeding. We adhere to that view.

It is urged that as the plaintiff in error had been lawfully notified to appear and contest the judgment of confirmation herein sought to be reversed, it was his duty to appear and present objections, if any he had, to the rendition of the judgment, and that in the absence of any such appearance or objection all objections not going to the jurisdiction of the court over the subject matter must be deemed waived, and cannot be presented for the first time in this court; and in support of this position counsel for defendant in error cite *Hunerberg v. Village of Hyde Park*, 130 Ill. 156, *Kelly v. City of Chicago*, 148 id. 90, *Young v. People*, 155 id. 247, and *Dickey v. City of Chicago*, 164 id. 37. In each of those cases so relied upon the property owner

appeared and filed objections to the rendition of judgment, and the ruling in each of the cases was, that such property owner could not be permitted to raise in this court certain other objections, for the reason he had not interposed such objections in the county court, and it should be deemed he had waived them. The doctrine which controlled in those cases was that of waiver, arising in law from the act of the party, and is based upon the rule that one appearing in a trial court to resist a proceeding against him should, in justice and good faith to the court and the adverse party, interpose all the objections he has to the proceedings, in order, if tenable, they may be obviated and removed in that court, if possible. An objection which touches upon the jurisdiction of the court over the subject matter of the action is not affected by the act or failure of the party to act, for the reason such jurisdiction must be conferred by law and cannot be granted by the consent of parties, nor even by their express waiver, much less by a waiver implied from an act of the party. But the principle that objections cannot be first raised in this court can have no application when the party does not appear and no objection is made in his behalf. He may be defaulted if he fails to appear in response to lawful notice, and will then be deemed to have confessed all that is well alleged against him in the pleadings. He may, when defaulted, be heard in a court of review to insist that, admitting all that is well alleged, yet the judgment against him is unwarranted. It is elementary law a judgment rendered by default may be reviewed as to alleged errors appearing on the face of the record. It is an appropriate function of a writ of error to procure a review of such a judgment. *Clark v. City of Chicago*, 155 Ill. 223.

The defendant in error insists that the view pressed in its behalf by counsel, that when a judgment confirming a special assessment is rendered by default all objections which might have been presented shall be deemed to have

been waived, is declared by this court in the case of *McChesney v. People ex rel.* 148 Ill. 221, and in support of such contention quotes a portion of a sentence from the opinion in that case, as follows: "The land owner, when notified by the commissioners as provided by the statute, is bound to appear and make his defense, and if he fails, the judgment of confirmation will be conclusive on him." The only point presented for reversal of the judgment in the case cited was, whether legal notice had been given the property owner of the time and place when and where the application for the confirmation of the assessment would be heard, and that being true, the judgment under consideration in that case would be conclusive if the point was not well taken, and the quotation from the opinion is but an observation of the court to that effect.

The fact that only two of the commissioners appointed by the city council to estimate the cost of the improvement in the case at bar joined in the making of the estimate, and that a third unauthorized party acted with them, appears from the signatures attached to the report. It is urged it was sufficient to file with the petition a copy of the body of the report, and that the signatures may be regarded as surplusage, and if so rejected the error does not appear. If not absolutely necessary it was proper to copy the entire report, including the signatures of the commissioners, and therefore it cannot be said the record proper is free from error.

Having determined the objection presented in the case at bar is fatal to the validity of the judgment under review, it is unnecessary we should discuss other alleged errors in the record.

The judgment is reversed and the cause remanded.

*Reversed and remanded.*

ELECTA W. YARNELL

v.

LEPHIA O. BROWN.

*Opinion filed December 22, 1897.*

1. JUDGMENTS AND DECREES—*assignee of judgment takes only an equitable interest therein.* A judgment is not assignable so as to vest a legal title in the assignee, and the assignee takes only an equitable interest therein subject to existing equities between the parties thereto.

2. SAME—*when assignee of judgment will be protected against latent equities of third persons.* An assignee of a judgment who has parted with a valuable consideration therefor will be protected against a latent equity of a third person of which he was ignorant, provided his equity is equal to that of such third person.

3. SAME—*the lien of a judgment is general.* The lien of an ordinary judgment is general, and not against any specific portion of the debtor's property, and is subject to existing equities.

4. MORTGAGES—*mortgagee has an equitable interest in land intended to be mortgaged but misdescribed.* One who parts with his money upon the security of a particular tract of land which is misdescribed in the mortgage has merely an equitable interest therein.

5. LIENS—*equity of mortgagee in misdescribed land is superior to lien of general judgment.* The equity of a mortgagee in a tract of land intended to be mortgaged to him, but which is misdescribed, is superior to the lien of a general judgment against the mortgagor, rendered before the mistake in description had been corrected.

6. SAME—*equity of mortgagee in misdescribed land is not superior to lien of attachment judgment.* The equity of a mortgagee in a misdescribed tract of land is not superior to the lien of an attachment judgment against such tract, rendered before the misdescription had been corrected and before the attachment plaintiff had notice of the mortgagee's equity therein.

7. SAME—*when equity of assignee of judgment will be protected against equity of the mortgagee.* The equity acquired by the assignee of an attachment judgment against land will prevail against that of a mortgagee in the same tract, which was to have been conveyed to the latter as security but which was misdescribed, where the assignee purchased the judgment for a valuable consideration, in ignorance of the mortgagee's rights.

8. SAME—*assignment of attachment judgment to attorney—how far his lien will be protected.* The lien acquired in a tract of land by an attorney under an attachment judgment, which was assigned to him as security for services performed and for future services, will be

protected against the latent equity of a third person only to the extent of the value of the services rendered before the attorney had notice of such third person's rights.

9. ATTACHMENT—*appearance of defendant and rendering of general judgment does not release attachment lien.* The appearance of the defendant in attachment proceedings and the rendition of a general judgment against him do not operate as an abandonment of the attachment proceedings nor release the attachment lien.

10. APPEALS AND ERRORS—*one cannot complain of error which concerns another alone.* The defendant in foreclosure proceedings whose rights alone are affected by the decree is the only party who can complain of the alleged error of the court in vacating the decree at a subsequent term, on motion of the complainant, in order to correct a misdescription of the mortgaged premises, instead of proceeding by bill of review.

*Yarnell v. Brown*, 65 Ill. App. 83, reversed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Christian county; the Hon. ROBERT B. SHIRLEY, Judge, presiding.

W. L. GROSS, and E. S. ROBINSON, for appellant:

A judgment or decree entered upon an unauthorized appearance will not be set aside or opened to the prejudice of innocent third parties. *Kenyon v. Shreck*, 52 Ill. 382.

A party cannot be heard to complain of an error which he has himself induced the court to commit. *Smith v. Kimball*, 128 Ill. 583.

Having entered a final decree in foreclosure and adjourned for the term, the court loses jurisdiction of the cause, save only the power to rectify defects or imperfections in matter of form and in affirmance of the judgment. Statute of Amendments and Jeofails, sec. 2; *Hugh v. Goodrich*, 59 Ill. 459; *Lilly v. Shaw*, id. 72; *State Savings Inst. v. Nelson*, 49 id. 171; *Fielding v. People*, 128 id. 595.

A motion to vacate a judgment, made at a subsequent term, is a direct and original proceeding, and the parties to be affected must be before the court. *Clafin v. Dunne*, 129 Ill. 241.

Courts cannot, at a subsequent term, set aside judgments and decrees, or amend them, except in form, and then only upon notice. *Ayer v. Chicago*, 149 Ill. 262; *Ives v. Hulce*, 17 Ill. App. 30.

The court has no power, at a subsequent term, to make an order dismissing a suit which will have the effect to set aside a final decree of foreclosure, and sale may be made notwithstanding such order. *Kirby v. Runals*, 140 Ill. 289.

A bill of review is the proper remedy to reverse or modify a decree that has been signed and enrolled, for error in law apparent on the face of the decree, or on account of new facts discovered since the decree was entered in the original cause. 3 Ency. of Pl. & Pr. p. 570, note 1; *Bramblet v. Pickett*, 2 A. K. Marsh. 10; *Stewart v. Beard*, 3 Md. Ch. 227; *Hodges v. Davis*, 4 Hen. & M. 400.

A purchaser is presumed to have notice of any defect of title apparent on the face of his title papers or by the record, and will be required to take notice of the title or claim of persons in possession, but is not required to look for latent defects in the chain of conveyances, when regular on their face and apparently conveying the legal title. *Dickerson v. Evans*, 84 Ill. 455; *Robbins v. Moore*, 129 id. 44; *Moore v. Hunter*, 1 Gilm. 317.

A judgment lien attaches to whatever interest in real estate the record discloses in the judgment debtor, in the absence of notice from other sources; and notice, at the time of the levy of execution and sale, of an unrecorded deed or mortgage will avail nothing as against the force of the lien. *Martin v. Dryden*, 1 Gilm. 188; *Massey v. Westcott*, 40 Ill. 160; *Buggy Co. v. Graves*, 108 id. 462.

G. FRED RUSH, and J. C. MCBRIDE, for appellee:

A judgment is a chose in action, and not assignable, and an assignee can acquire no greater rights by the assignment than had the assignor. *McJilton v. Love*, 13 Ill. 487; *Hughes v. Trahern*, 64 id. 49; *Padfield v. Green*, 85 id.



529; *Winslow v. Leland*, 128 id. 337; *Bank v. Taylor*, 131 id. 377; *Sutherland v. Reeve*, 41 Ill. App. 303.

An order announced by the court authorizing a decree by the memoranda made upon his docket, is not a decree, but only a guide in preparing decree, and has no binding effect until the decree is prepared and approved by the court. Even the filing of a decree with the clerk in vacation, without the approval or order of the court, does not constitute it a decree. *Stevens v. Coffeen*, 39 Ill. 148; *McLain v. Vanwinkle*, 46 id. 406; *Hughes v. Washington*, 65 id. 245; *Edwards v. Evans*, 61 id. 492; Black on Judgments, secs. 301, 328.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On September 1, 1876, James S. Woolley owned and resided upon a farm of one hundred and thirty-seven acres in Christian county, and on that day executed, with his wife, a mortgage to the appellee, Lephia O. Brown, to secure the payment of \$1000 borrowed money five years after date, with interest to be paid annually, intending to mortgage a forty-acre tract of the farm which was situate in range 1, east of the third principal meridian, but by mistake the land was described as being in range 1, west. Woolley had also given an unsecured note for \$600 to one Spaulding, who in 1889 gave that note to the appellant, Electa W. Yarnell, a daughter of Woolley. On July 22, 1889, Mrs. Yarnell began an attachment suit upon that \$600 note against her father, who had become a non-resident, and caused the attachment writ to be levied upon the forty-acre tract which Woolley and Mrs. Brown intended to be, and supposed was, included in the mortgage. Woolley entered his appearance in the attachment suit, and on June 6, 1890, a general judgment was rendered against him in favor of Mrs. Yarnell for \$1283.21, which she on the same day assigned to her attorney, William L. Gross, to secure him for services

rendered and to be rendered for her as such attorney. Woolley paid the interest on his indebtedness to Mrs. Brown up to September 1, 1889, but the interest due September 1, 1890, was not paid, and on November 7, 1890, the original bill in this case was filed by Mrs. Brown for the foreclosure of her mortgage. At the March term, 1891, the appearance of Woolley was entered in writing in the foreclosure suit, his default was taken, and the judge entered on his docket the usual order for a decree of foreclosure and sale for \$1138.35, with costs. Up to this time the mistake in the mortgage had never been detected, but it was discovered before the decree was entered by the clerk, and no decree was ever entered at large upon the records. The entire entry of record was a transcript of the judge's minutes, without the description of any property or any of the usual provisions. An execution having been issued on the judgment in the attachment suit, the land in question was sold June 19, 1891, to Gross for \$1434.24, the amount due on the judgment with costs, and he received a certificate of purchase. The error in the mortgage having been discovered, the previous orders and decree in the cause were at the August term, 1891, on the motion of Mrs. Brown, set aside, with leave to amend the bill and make new parties. The bill was amended, setting up the mistake and asking a correction, and making Mrs. Yarnell and her husband and Gross defendants. They were served for the November term, 1891, and answered the amended bill. Their answers were afterward amended, and their defense was that the court had no right to set aside the former decree and that they had no notice of the mistake or of Mrs. Brown's rights. Woolley answered admitting all the allegations of the amended bill. Pending the litigation Gross obtained a sheriff's deed, January 4, 1895. On a hearing a decree was entered finding that Mrs. Yarnell had notice of the equities of Mrs. Brown; that her interest and that of Gross were subject to the mortgage lien, and that the

husband, W. R. Yarnell, had no interest in the premises. The decree corrected the mistake and ordered a foreclosure and sale. Mrs. Yarnell and Gross appealed to the Appellate Court, where the decree was reversed and the cause remanded to the circuit court, with directions to ascertain the amount due Gross from Mrs. Yarnell and make his claim the first lien to that amount, to make the amount due Mrs. Brown a second lien and to order a sale accordingly. From that judgment Mrs. Yarnell has prosecuted this appeal, and Mrs. Brown has assigned cross-errors upon the record.

It is insisted on behalf of the appellant that the circuit court had no power, at the August term, 1891, to set aside its decree of the March term preceding, on the motion of appellee, but that appellee misconceived her remedy and should have proceeded by a bill of review. That decree was against James S. Woolley, and he was the only one whose rights were in any manner affected by the method employed to set aside the former decree. It is no concern of appellant that it was done by a motion, rather than upon an issue formed or by default upon a bill of review. The only party interested in that question has found no fault with the method but is content with the order, and appellant cannot be heard to object for him.

It is also claimed that appellant had no knowledge of the mortgage or of the land intended to be conveyed thereby; but we are well satisfied with the conclusion of the circuit and Appellate Courts that she had such knowledge and that her rights were subordinate to those of appellee.

The remaining question is whether the equities of William L. Gross are superior to those of appellee, and if so, to what extent. A judgment is not assignable, at common law or under our statute, so as to vest a legal title in the assignee, and the purchaser obtains only an equitable interest. (*McJilton v. Love*, 13 Ill. 486; *Hughes*

v. *Trahern*, 64 id. 48.) The purchaser takes the judgment subject to all equities existing between the parties to it. It has been the rule in this State that the purchaser of certain things in action will be protected against the latent equities of third persons of whose rights he could know nothing. Thus, in the case of mortgages it has been repeatedly held that an assignee is so protected against such equities. (*Olds v. Cummings*, 31 Ill. 188; *Silverman v. Bullock*, 98 id. 11; *Himrod v. Gilman*, 147 id. 293; *Humble v. Curtis*, 160 id. 193.) But in order to make that rule applicable the equities must be equal. If the assignee is a mere donee, or the lien acquired is inferior in its nature to another equity, he will not be preferred. The lien of an ordinary judgment is general, and not specific against any particular thing. It only extends to what the debtor really has, subject to the equities in it at the date of the judgment. A mortgagee deals with particular property, and in this case appellee parted with her money upon the security of a particular tract of land which was misdescribed, so that her right was equitable only, but the equitable interest was in that particular tract. Such an equity would be regarded as superior to that of appellant, so far as her judgment was a general lien upon the property of her father, James S. Woolley. The appearance of Woolley was entered in the attachment suit and a general judgment was rendered against him, and it is argued on behalf of appellee that the attachment was thereby abandoned and the lien of the attachment released, so that the lien of the judgment became a general one. We do not think that such is the effect of the judgment. It is true that execution might issue thereon, not only against the property attached but the other property of Woolley, and yet the lien as to the particular tract of land levied upon was preserved, and appellant was not put in a worse position by the appearance and general judgment than she would have been if Woolley had not appeared. It appears, therefore, that

so far as the liens upon the land are concerned the equities are such that the same rule applied in the assignment of mortgages should prevail, and the rights acquired by Gross without notice should be protected.

When the assignment was made to Gross he had rendered services to appellant which the judgment was assigned to secure, but it was also intended to secure payment for services and expenses to be rendered in the future, and he continued to render services and incur expenses after he and appellant were brought into this suit and had full notice of appellee's equities. For these services and expenses subsequent to such notice, and in defending appellant's claim and his own to priority over appellee in this suit, he charged and claimed the right to payment out of the judgment. By this means there has been a very large increase in his claim after actual notice of appellee's equities. The only valuable consideration actually passing between him and appellant prior to notice were the services performed and the expenses incurred up to that time. A valuable consideration is an essential requisite to secure an equitable right to precedence in such a case as this, and if notice is received before the consideration is actually parted with, it must be held a valid and binding notice, which will preclude an assignee from acquiring any right upon a subsequent consideration as against the prior equity. After such notice Gross was not bound to perform the services or incur the expenses upon the faith of the security, and would have had ample relief against his agreement on account of the failure of the security. To permit him, after notice, to go on and consume the whole or a large part of the value of the property in litigation, to the further impairment or destruction of the prior equitable right, would be most inequitable and unjust. He testified to his subsequent services and disbursements, and his charges therefor, as well as the continuing charges in this litigation, and the judgment of the Appellate

Court directed the circuit court to ascertain the amount due him from appellant and allow the same as a first lien. We think that this was wrong.

The judgment of the Appellate Court and decree of the circuit court are reversed and the cause is remanded to the circuit court, with directions to ascertain the amount equitably due to William L. Gross from appellant for services and expenses to secure which the judgment was assigned to him, up to the service of process on him under the amended bill in this case, and to make his claim a first lien for such amount and appellee's mortgage a second lien, and to enter a decree of foreclosure accordingly.

*Reversed and remanded.*

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THE PEOPLE *ex rel.* Willis B. Powell *et al.*

v.

JOHN HARTLEY, County Clerk.

*Opinion filed December 22, 1897.*

1. ELECTIONS—*effect of refusal of clerk to place names of nominees upon the official ballot.* The refusal of the county clerk to place upon the official ballot the names of candidates nominated by a county convention because the certificate of nomination was not filed thirty days before the date of the election, is, in effect, a holding that the certificate of nomination was inoperative.

2. SAME—*vacancies caused by inoperative certificate of nomination—how filled.* Vacancies caused by the county clerk's holding a certificate of nomination for county offices to be inoperative, may, under section 9 of the Ballot act, (Laws of 1891, p. 110,) be filled by the county central committee by re-nominating the original candidates, where no provision for filling vacancies was made by the nominating convention and there is not sufficient time to call another convention.

ORIGINAL petition for *mandamus*.

FIFER & BARRY, BAYARD W. WRIGHT, and H. MAYO,  
for relators.

R. M. BARNES, and EDGAR ELDREDGE, for respondent.

Per CURIAM: The questions for decision in this case arise on the demurrer of the respondent to the petition for *mandamus* filed in this court by the relators. It appears from the petition that the regular convention for the nomination of candidates of the republican party for county offices of Marshall county, to be voted for at the election then to be held on the third day of November, 1896, was held at Lacon, in said county, on the 27th day of August, 1896, and nominated a candidate for each of said offices. A certificate of such nominations was afterwards, on the 19th day of October, 1896, filed with the county clerk. The certificate was in due form and properly certified, and no objections to it were filed, but the county clerk refused to place the nominees therein named on the official ballot, for the reason that the certificate was not filed thirty days before the day of the election. Thereupon the republican county central committee, which was the regularly elected general committee representing the republican party of Marshall county, met and filled the alleged vacancies by nominating the same nominees for the same offices, respectively. The nominations thus made by the committee were duly certified and the certificate filed with the county clerk, but that officer still refused to place the names of such nominees on the official ballot, and this petition was then filed to compel him to do so.

Section 9 of the act entitled "An act to provide for the printing and distribution of ballots at public expense," etc., approved June 22, 1891, commonly called the "Ballot law," is as follows: "In case a candidate who has been duly nominated under the provisions of section six (6) of this act die before election day, or decline the nomination, as in this act provided, or should any certificate of nomination be held insufficient or inoperative by the officer with whom they may be filed, the vacancy or va-

cancies thus occasioned may be filled by the political party or other persons making the original nominations, or, if the time is insufficient therefor, then the vacancy may be filled, if the nomination was by convention or caucus, in such manner as the convention or caucus had previously provided, or, in case of no such previous provision, then by a regularly elected general or executive committee representing the political party or persons holding such convention, meeting or caucus. The certificates of nomination made to supply such vacancy shall state, in addition to the other facts required by section six (6) of this act, the name of the original nominee, the date of his death or declination of nomination, or the fact that the former nomination has been held insufficient or inoperative, and the measures taken in accordance with the above requirements for filling a vacancy, and it shall be signed and sworn to by the presiding officer and secretary of the convention or caucus, or by the chairman and secretary of the duly authorized committee, as the case may be."

We are of the opinion that the refusal by the county clerk to have the names of the candidates nominated by the county convention held on August 27 printed on the official ballot was, in effect, to hold that the certificate of nomination was inoperative under the statute. If the first certificate became inoperative, it followed, under the provisions of the statute, that there were vacancies to be filled. These vacancies were filled in the manner prescribed in section 9, and no reason is perceived why they might not be legally filled by the proper political committee by the nomination of the same candidates. As the convention which nominated the candidates in the first place had made no provision for the filling of vacancies, and there was not, under the statute, sufficient time to fill such vacancies by the original political authorities who made the nominations in the first instance, the vacancies could be filled only "by a regularly elected general



or executive committee representing the political party or persons holding such convention, meeting or caucus."

The petition shows sufficient grounds for the allowance of the writ. To hold otherwise would place it within the power of the officials charged with the duty of printing the ballots, to disfranchise, for all practical purposes, a great number,—perhaps a majority,—of the legal voters in their counties, for while the voters might write upon the ballot the names of those for whom they desired to vote, still a large body of electors could not be expected to do this, or even to know with certainty the names of all the candidates.

This cause was argued, submitted and decided at the October term, 1896, and the writ was awarded as prayed, and this opinion is filed in pursuance of the announcement then made.

*Writ awarded.*

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FRANK ADAMSKI

v.

JOHN WIECZOREK.

*Opinion filed December 22, 1897.*

1. REVIEW—*bill to impeach former decree for fraud may be filed as a matter of right.* A bill to set aside a former decree on the ground that it was obtained by fraud and subornation of perjury may be filed as a matter of right, without obtaining leave of court.

2. SAME—*proper practice on opening former decree under bill of review.* The proper practice on opening a former decree under a bill of review is, to hear the original cause and bill of review, with the evidence under each, together, and any other material evidence.

3. JUDGMENTS AND DECREES—*order opening former decree for rehearing is merely interlocutory.* An order of the court opening a former decree for rehearing under a bill of review, charging fraud and subornation of perjury in its procurement, is interlocutory, merely, and not the subject of appeal or writ of error.

*Adamski v. Wieczorek*, 66 Ill. App. 582, affirmed.

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| s98a | 865 |

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| 170 | 878  |
| 200 | 1878 |

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| 170  | 878 |
| 209  | 495 |
| 112a | 618 |

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

EDWARD J. WALSH, and ELMER E. PARKS, for plaintiff in error.

A. G. ANDERSON, and F. W. PROUDFOOT, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

A decree was entered in the Superior Court of Cook county, dismissing for want of equity, at complainant's costs, a bill filed by John Wieczorek, defendant in error, against Frank Adamski, plaintiff in error. Afterward the defendant in error filed the bill in this case against plaintiff in error to impeach and set aside that decree, and to obtain a rehearing of the matters alleged in the bill so dismissed, and for relief. The ground upon which it was sought to set aside the decree was, that it was obtained by fraud and subornation of perjury on the part of plaintiff in error, and perjured testimony procured and purchased by him for a consideration. An issue was formed, and upon a hearing of the testimony in open court the allegations of the bill were found to be true, the decree in the original suit, and all proceedings therein, were set aside and a rehearing of the matters involved was granted. The cause was then removed by writ of error to the Appellate Court for the First District, where the writ was dismissed on the ground that the decree opening the former litigation and permitting a further hearing was interlocutory. The correctness of that decision is the only question in the case.

The parties call the bill in this case a bill of review, and it is in the nature of such a bill. In *Griggs v. Gear*,

3 Gilm. 2, it was said that a bill to impeach a former decree for fraud is very nearly allied to a bill of review, and that it may be filed at any time as a matter of right. In *Boydén v. Reed*, 55 Ill. 458, a bill of this kind is termed a bill of review in the nature of an original bill. Whether such a bill is sustainable strictly as a bill of review or not, it will be entertained, and the court, upon a hearing, will secure to the parties their rights, whatever they may be. A bill of review ordinarily lies to reverse or modify a decree for error in law apparent upon its face or on account of new facts discovered since the decree. (*Knobloch v. Mueller*, 123 Ill. 554.) Where the ground alleged for the review of a decree is newly discovered evidence, it is necessary to apply to the court for leave to file the bill, and where the court has refused to grant such leave this court has entertained an appeal or writ of error. (*Hoig v. Thrap*, 84 Ill. 302; *Walker v. Douglas*, 89 id. 425; *Schaefer v. Wunderle*, 154 id. 577.) Such a refusal seems to be regarded as a final determination of the sufficiency of the alleged new matter, if proved, as a ground for reversing or modifying the decree. Of the same nature is an order striking from the files a petition alleging newly discovered evidence and asking for leave to file a bill of review. (*Cole v. Littledale*, 164 Ill. 630.) Such rulings have been treated the same as sustaining a demurrer to a bill and finally disposing of the case. In case of a bill of this kind it is not necessary to obtain leave of court, but it may be filed as a matter of right, and if, upon sustaining a demurrer or on hearing, it should be dismissed, the decree would doubtless be final.

If an issue is formed on such a bill and the cause heard, the court may open the original decree for a rehearing, and in that case will, upon final hearing, re-affirm it, or revise, reverse or modify it according to the equities of the parties. Upon opening the original decree it is a proper practice to hear the original cause and the bill of review, with the evidence under each, together, and

also any other material evidence. The evidence taken on the hearing of this bill, showing the false and perjured character of the testimony in the original case, would be competent and material on the final hearing on the merits. In *Chicago Building Society v. Haas*, 111 Ill. 176, the circuit court, under a bill filed to impeach a decree for fraud, set aside the decree and ordered an account stated between the parties. Substantial rights of the parties were there finally determined and an appeal was heard in this court. So, also, in *Allison v. Drake*, 145 Ill. 500, the decree on the bill of review definitely and finally determined the rights of the parties in the premises, ordered a conveyance and decreed an accounting. It was held that such a decree was final, notwithstanding the order for an accounting, and the appeal was properly taken. In *Axtell v. Pulsifer*, 155 Ill. 141, while the subject of appeal was not discussed, the bill was only filed to set aside a default and decree entered in pursuance of it, so that the parties might make a defense in the original suit, of which they had been wrongfully deprived. No further relief was sought under the bill, and so far as it was concerned the proceeding was ended. In this case, however, the rights of the parties in the matters in controversy had not been decided or settled by the decree opening the cause. The bill of review was still under control of the court, and upon final hearing the court might restore the parties to their former rights and again enter the decree set aside for the purpose of the rehearing, or such other decree as the evidence in the original cause and under the bill of review might require. The decree opening the original decree for a rehearing was interlocutory, merely, and not the subject of appeal or writ of error.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

THE BLOOMINGTON CEMETERY ASSOCIATION

v.

THE PEOPLE *ex rel.* W. J. Baldridge, County Collector.

*Opinion filed December 22, 1897.*

1. TAXES—*laws exempting property from taxation will be strictly construed.* Laws exempting property from taxation will be strictly construed, and all reasonable intendments will be indulged in favor of the State.

2. SAME—*lot adjoining cemetery grounds used as residence for custodian is not exempt from taxation.* A separate lot adjoining a cemetery, purchased, held and used, not for burial purposes, but for an office and residence of the custodian of the grounds, and upon which is a well to supply water for use in the grounds, does not come within the constitutional or statutory provisions exempting cemetery grounds from taxation.

APPEAL from the County Court of McLean county;  
the Hon. COLOSTIN D. MYERS, Judge, presiding.

OWEN T. REEVES, for appellant.

ROWELL, NEVILLE & LINDLEY, (R. L. FLEMING, of  
counsel,) for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The only question presented by this record is, whether or not lot 5, in block 13, of John Niccolls & Co.'s addition to Bloomington, owned by appellant and enclosed with its cemetery grounds, is subject to taxation. The association was incorporated by a special act February 16, 1857, with capital stock of \$10,000, divided into shares of \$1000 each, which might be paid for in real estate. The charter provided that "the object of said association shall be, exclusively and solely, to lay out and enclose and ornament a plat or piece of ground, not to exceed one hundred acres, as aforesaid, to be used as a burial place, to which, if thought best, may be added a floral garden by said association; and said piece of ground so held and

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| 170 | 877  |
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platted shall be exempt from taxation and execution." It was also provided that one-fourth of all the proceeds of sales of burial lots should be expended in improving and ornamenting the grounds and the balance paid to the stockholders. It appears that in 1857 the association bought a tract of land containing 33.14 acres, and also said lot 5, which lot adjoined said tract on the west, and was purchased to connect said tract with a public street, and was used at first, in part, as an entrance, but later another street was laid out and the association built a dwelling house and dug a well on this lot. The custodian employed by the association lived in this house, part of the time keeping house and part of the time boarding with a family living there under arrangements made with him. One room was reserved and used as an office by the association, and the well was used to provide water for the cemetery grounds. This lot had not been, nor was it designed to be, platted or used for burial purposes. The county court overruled the objections of the association, and rendered judgment against the lot for the tax assessed against it.

Laws exempting property from taxation will be strictly construed, and all reasonable intendments will be indulged in favor of the State, and unless it clearly appears that the property is exempt, it must, like other property, be held subject to taxation. *In the matter of Swigert*, 119 Ill. 83; *Montgomery v. Wyman*, 130 id. 17; *Rosehill Cemetery Co. v. Kern*, 147 id. 483; *People ex rel. v. City of Chicago*, 124 id. 636.

It will be noticed that the sole and exclusive object of the association was to lay out, enclose and ornament a plat or piece of ground to be used as a burial place, and the exemption is in these words: "Said piece of ground so held and platted shall be exempt from taxation and execution." It would require a construction more liberal than is applied to statutes exempting property from taxation, to bring within this exemption clause a separate adjoin-

ing lot, purchased, held and used, not for burial purposes, but for an office and dwelling of the custodian of the grounds and for a supply of water. If a strict construction were once departed from, it would not be difficult in many cases to prove that property of great value, not strictly within the terms of the exemption, is yet within its spirit, by showing that it is in the highest degree useful for the purpose to which the exempted property is devoted. Section 3 of article 9 of the constitution of 1870 provides that such property as may be used exclusively for cemetery purposes may be exempted from taxation by general law, and the general law on the subject is that "all lands used as grave-yards or grounds for burying the dead" shall so be exempt. 2 Starr & Curtis' Stat. chap. 120, sec. 2.

Applying the rule of strict construction in favor of the State, we find nothing in this statute, nor in the charter of the association, which can be held to extend the exemption to the lot in question.

The judgment of the county court must be affirmed.

*Judgment affirmed.*

THE WEST CHICAGO STREET RAILROAD COMPANY

v.

MARTIN DOUGHERTY.

*Opinion filed December 22, 1897.*

1. INSTRUCTIONS—when instruction does not single out and give undue prominence to particular testimony. An instruction that the deposition of a certain person (naming him) should be considered by the jury with all the other evidence in the case, and be given such weight as they might think it entitled to in connection with the circumstances and evidence in the case, does not single out and give undue prominence to particular testimony.

2. SAME—where the evidence is conflicting the jury should be accurately instructed. Where there is a conflict in the evidence it is important that the jury should be accurately instructed as to questions of law.

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83a 426  
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e211 18  
111a 150

170 379  
212 57

3. APPEALS AND ERRORS—*when refusal of an instruction concerning the plaintiff's interest will reverse.* The refusal of an instruction that while the law permits the plaintiff to testify, yet the jury may consider that he is the plaintiff and interested in the suit, in determining how much credence is to be given to his testimony, will work reversal, where there is a conflict in the evidence and no other instruction upon the question is given.

*West Chicago Street R. R. Co. v. Dougherty*, 64 Ill. App. 599, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

This was an action for personal injuries, brought by Martin Dougherty, against the West Chicago Street Railroad Company, resulting from an accident which occurred in October, 1892, at the intersection of Milwaukee and Wabansia avenues, in Chicago. Appellee, about seven o'clock in the morning, was riding to his work in a wagon owned and driven by one James O'Brien. Wabansia avenue, at the place where it crosses Milwaukee avenue, does not run directly east and west, but there is a jog in the street of about one hundred and seventy-five feet. As the wagon approached Milwaukee avenue on Wabansia avenue from the east and turned north on Milwaukee avenue in order to again go to Wabansia avenue, a car of appellant company, north-bound, passed them, and after it had proceeded some twenty-five or thirty feet past the wagon, O'Brien turned his horse for the purpose of crossing the tracks. At this time another car of appellant, south-bound, was from seventy-five to one hundred feet distant, but the north-bound car which had just passed the wagon obstructed the view of O'Brien, the driver. The car struck the wagon with such force as to throw it some eighteen feet, and appellee was thrown out and received serious injuries.

Upon the trial of the cause in the circuit court of Cook county the jury returned a verdict in favor of plaintiff



below for \$3000, on which judgment was rendered, and on appeal to the Appellate Court this judgment was affirmed. From the judgment of the Appellate Court this appeal is prosecuted to this court.

EGBERT JAMIESON, and JOHN A. ROSE, for appellant.

JAMES B. MCCracken, and ALBERT M. CROSS, for appellee.

Mr. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

All questions of fact have been conclusively settled by the judgments of the circuit and Appellate Courts. Appellant assigns and urges as error the admission of certain testimony, and the giving of instructions on the part of the plaintiff below and the refusal of instructions on behalf of the defendant.

Upon the trial of the cause the defendant desired to show by the plaintiff that just before the accident he had remonstrated with O'Brien, the driver, as to the danger of crossing the track at that particular time, and assigns as error the court refused to permit it to do so. An examination of the record discloses that there was no error in this respect. The witness, on being interrogated regarding this fact, was asked:

Q. "Well, you didn't tell him what to do and what not to do, did you?"

A. "No, sir; I told him nothing.

Q. "You didn't find any fault with him for what he did?"

A. "No, sir."

The trial court, at the request of the plaintiff, instructed the jury that the deposition of one James O'Brien should be considered by the jury with all the other evidence in the case, and be given such weight as they might think it entitled to in connection with the circumstances and the evidence in the case. It is urged that

this instruction singles out and gives undue prominence to the evidence of O'Brien. The object of the instruction was to inform the jury that the deposition, under the law, should be considered in the same manner as if the witness had himself been present and testified in the case. It is apparent the jury were not misled or deceived by the instruction. It did not call attention to any fact testified to, but to the fact that a deposition was to be considered in the same way as if the witness had testified in open court.

Error is assigned by appellant that the court refused to give to the jury the following instruction asked by defendant:

"The jury are instructed that while the law permits the plaintiff in the case to testify in his own behalf, nevertheless the jury have the right, in weighing his evidence, to determine how much credence is to be given to it, and to take into consideration that he is the plaintiff and interested in the result of the suit."

No instruction was given on this question and no objection exists to the instruction. There was a sharp conflict in the evidence as to who was guilty of negligence,—the plaintiff and the driver of the wagon or the servants of the defendant. The evidence for the plaintiff as to the negligence of defendant was shown by his testimony and that of O'Brien. The testimony of the gripman and of four or five passengers on the car which struck the wagon was in conflict with the testimony for plaintiff. We have held that where there is such conflict it is important that the jury should be correctly instructed. The refusal of this instruction was error.

The judgment is reversed and the cause is remanded.

*Reversed and remanded.*

## THE CALUMET ELECTRIC STREET RAILWAY COMPANY

v.

JOHN P. CHRISTENSON.

*Opinion filed December 22, 1897.*170 883  
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115a 1518

1. APPEALS AND ERRORS—*motion for verdict must be accompanied by written instruction.* Alleged error of the trial court in denying a motion to take the case from the jury and direct a verdict cannot be considered in the Supreme Court, where no written instruction directing a verdict is offered with the motion.

2. TRIAL—*peremptory instruction comes too late when offered in the series.* One cannot raise the question whether the case should be submitted to the jury upon the facts, by a peremptory instruction offered as one of a series of instructions upon which the case is submitted.

*Calumet Electric St. Ry. Co. v. Christenson*, 70 Ill. App. 84, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

JUDSON F. GOING, for appellant.

B. F. CHASE, and F. H. NOVAK, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee obtained a judgment against appellant in the circuit court of Cook county, which has been affirmed by the Appellate Court for the First District.

The only complaint made in this court is, that the trial court overruled defendant's motions to take the case from the jury and direct a verdict for defendant, and refused to give to the jury the thirteenth instruction requested by defendant. A motion to take the case from the jury and direct a verdict for defendant was made at the close of the evidence for plaintiff and renewed at the close of all the evidence, but no written instruction directing such a verdict was presented with the motion, to

be given by the court. In order to preserve the question sought to be raised in this court an instruction must be presented in writing. (*Bartelott v. International Bank*, 119 Ill. 259; *Wenona Coal Co. v. Holmquist*, 152 id. 581; *Swift & Co. v. Fue*, 167 id. 443.) The thirteenth instruction which was refused directed a verdict for the defendant, and was one of a series presented by defendant on the submission of the cause to the jury. A party cannot raise the question whether the case ought to be submitted to the jury by an instruction offered in a series by which it is so submitted. *Peirce v. Walters*, 164 Ill. 560; *Vallette v. Bilinski*, 167 id. 564.

It is the duty of the trial judge upon a motion for a new trial, and of the Appellate Court in reviewing his decision upon such motion, to consider and decide upon controverted questions of fact, but the responsibility for the decision of such questions in suits at law ends with the Appellate Court. The motions and instructions were not sufficient to preserve the question whether or not the evidence, as a matter of law, justified the submission to the jury.

The judgment of the Appellate Court must be affirmed, and is affirmed accordingly.

*Judgment affirmed.*

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JOSEPH BARCLAY, Sr. *et al.*

*v.*

LAWRENCE J. PLATT *et al.*

*Opinion filed December 22, 1897.*

1. USES—when use is executed by statute and title passes to beneficiaries. Where property is devised to executors for the benefit of the testator's son and his children, the use is executed by the statute, (Rev. Stat. 1874, chap. 30, sec. 3,) and the title passes directly to the beneficial devisees if no powers or duties are conferred or imposed upon the executors, respecting either the property or the beneficiaries, which require them to hold the legal title.

2. **WILLS**—*clause of will construed as creating a life estate with remainder in fee.* A devise of property "for the benefit" of the testator's daughter and son, "for them and their children, should they have any," creates a life estate in the testator's children in an undivided half of the property with remainder in fee to any children which might be born to either, and neither creates an estate in cotenancy between them and their children nor limits the remaindermen to children in being at the testator's death.

3. **REMAINDERS**—*remainder to life tenant's children vests at birth of first child.* A remainder in fee to the life tenant's children, "should he have any," vests at the birth of the first child, subject to being diminished by the birth of other children.

4. **PARTITION**—*sale of property having a life estate in undivided half—proper treatment of proceeds.* Upon the sale, under a partition decree, of property in which a life estate exists in an undivided half with remainder in fee to the life tenant's children, one-half the proceeds of the sale must be treated the same as the property would have been if not sold, in order to preserve the rights of the respective parties.

5. **SAME**—*when appellant must pay costs on appeal from partition decree.* The appellants must pay the costs on appeal from a partition decree, where there is no controversy as to the rights of one appellee and no error is assigned questioning the decree as to him, and the other appellees are minor children against whom the contention of the appellants is not sustained, although the decree is reversed owing to a different construction by the Supreme Court from that of the trial court of the will under which the parties claim.

APPEAL from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

F. J. GRIFFEN, for appellants.

J. W. MERRIAM, for appellees Joseph Barclay, Jr., and Emily Edith Barclay.

MORTON T. CULVER, for appellee Lawrence J. Platt.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On April 14, 1875, Daniel Barclay made his last will and testament, the fifth clause of which was as follows:

"I give and devise unto my executors hereinafter named, the following tract or piece of land situated in

the city of Chicago, county of Cook and State of Illinois: the west thirteen feet of lot 17 and the east nine feet of lot 16, in Reynolds' subdivision of the south-west quarter of block 45, canal trustees' subdivision of section 7, township 39, range 14, east, together with the buildings and improvements thereon, in trust for the use and benefit of my daughter, Ida Louise Barclay, during her natural life and at her death to the Foundlings' Home of Chicago, at present situated on Wood street, between West Madison and West Monroe streets, in said city, to be used and applied to the uses of said Foundlings' Home."

By the seventh clause he disposed of a leasehold interest on State street, Chicago, and provided for the payment of \$2000 to his son, Joseph Barclay, one of the appellants, out of rents and profits of said premises. Afterward, on December 10, 1879, he executed a codicil to the will, in part as follows: "Now, my daughter Ida having died, and having sold the lease on State street, I must make some changes. The property set apart in will for Ida is now null and void. I revoke part of here set apart for my daughter Marianna R. Platt. I revoke the money set off for my son, Joseph. \* \* \* I now place the house in the hands of the administrators that was set apart for Ida, for the benefit of Marianna R. Platt and my son, Joseph, for them and their children, should they have any."

The testator, Daniel Barclay, died February 2, 1880, leaving his said children, Marianna R. Platt and the appellant Joseph Barclay, surviving him, and the will and codicil were admitted to probate February 9, 1880. Marianna R. Platt was afterward married to Samuel T. Wright, and they are both dead. The appellee Lawrence J. Platt, who is the only child of Marianna R. Platt, filed the bill in this case, asking for a partition between himself and Joseph Barclay of the premises described in the fifth clause of the will, which by the codicil was devised for the benefit of Marianna R. Platt and Joseph Barclay, and for a construction of the will and an ac-

counting. Among the defendants to the bill were Henry H. Tracey, the surviving executor, and Joseph Barclay and his two children, Joseph Barclay, Jr., and Emily Edith Barclay, who were born after the death of the testator. After the original bill was filed, the appellant Henry L. Glos, on his own motion, became a party defendant, alleging that after the filing of the bill he had purchased and received a conveyance of the interest of Joseph Barclay in the property, and he filed his answer in the cause setting up his interest. The cause was referred to a master in chancery, who reported, in substance, that by the will and codicil the testator devised the real estate to his executors in trust, for the joint use and benefit of Marianna R. Platt and Joseph Barclay and their children, intending that Marianna R. Platt and her children should have the use and benefit of one-half during her natural life, with remainder to her children absolutely on her death; that Joseph Barclay and his children should have the use and benefit of the other half in like manner, with the interest of the children commencing at birth and the remainder to them absolutely at his death; that the executors should have the management of the estate during the lives of Marianna R. Platt and Joseph Barclay, and that said executors should pay the income to them and their children during the life tenancies. He therefore found that the complainant was entitled to one-half in fee simple, his mother being dead and the trust terminated as to that half, and that he was entitled to a partition, but that the trust survived in full force as to the other half, which should be held and managed in trust for the use and benefit of Joseph Barclay and his children during the life of said Joseph Barclay. Exceptions of the defendants Joseph Barclay and Henry L. Glos were disallowed, the master's report was confirmed, and a decree was entered in accordance therewith. From that decree this appeal was prosecuted.

No question is made as to the ownership of an undivided half of the premises sought to be partitioned, by the complainant Lawrence J. Platt, or as to his right to a partition. It is conceded that under any construction of the will he is entitled to one-half of the real estate in fee, as claimed and ordered to be set off to him, and the only contest is between the defendants Joseph Barclay and his grantee, Henry L. Glos, on the one side, and the minor children of Joseph Barclay on the other. Joseph Barclay and Henry L. Glos claim that there was an absolute devise of the undivided half of the premises to Joseph Barclay and his children, if he should have any when the will took effect at the death of the testator, and that as he had no children at that time he took the entire fee and his after-born children took nothing. This is the ground for the appeal.

We do not agree with the contention that Joseph Barclay took the fee, nor are we able to sustain the decree as made, establishing an active trust in the undivided half devised for the use and benefit of Joseph Barclay. The devise of the beneficial interest was equivalent to a devise of the land itself. (*Ryan v. Allen*, 120 Ill. 648; *Carpenter v. VanOlinder*, 127 id. 42; *Zimmer v. Sennott*, 134 id. 505.) No duties were imposed on the executors, either with respect to the beneficiaries or the property itself. There was no agency, duty or power imposed on them to manage or control the property or apply the rents or income, or to perform any other duty requiring them to hold the legal title. The use was therefore executed by the statute and the title passed directly to the devisees. Rev. Stat. chap. 30, sec. 3; Perry on Trusts, sec. 298; *Witham v. Brooner*, 63 Ill. 344; *Lynch v. Swayne*, 83 id. 336; *Kirkland v. Cox*, 94 id. 400; *O'Melia v. Mullarky*, 124 id. 506.

Nor do we find any warrant in the will for the conclusion that there was a devise to Joseph Barclay and his children during his lifetime, with the remainder in fee to his children after his death. If he and his children be-



came tenants in common there would be no ground for saying that his estate was limited to his life while that of the children was a fee. The language of the codicil was: "For the benefit of Marianna R. Platt and my son, Joseph, for them and their children, should they have any." As the use was executed, the language is to be construed the same as a devise made directly to Marianna R. Platt and Joseph Barclay, for them and their children, which devised the land to them and limited a remainder to their children. As we interpret the will there was a devise of the undivided half to Joseph Barclay for life with remainder in fee to his children, and upon the birth of his child Joseph Barclay, Jr., the remainder vested in him, subject to be diminished as others should be born. It would open to let in after-born children, and is now vested in Joseph Barclay, Jr., and Emily Edith Barclay, subject to have their respective interests reduced by the birth of other children of Joseph Barclay.

This necessitates a reversal of the decree of the Superior Court, and it is reversed and the cause remanded, with directions to proceed in conformity with the views herein expressed; and if the premises shall be sold, one-half of the proceeds shall be treated the same as the premises should be if not sold, so as to protect and preserve the rights of the respective parties.

As there is no controversy concerning the title of the appellee Lawrence J. Platt, and no error is assigned questioning the decree as to him, he will not be required to pay any costs. We have not sustained the contention of appellants, although giving a different construction to the will from that of the Superior Court; and being of the opinion that no costs should be taxed to the minor children, the appellants will be required to pay the costs.

*Reversed and remanded.*

## PETER LOURANCE

v.

JOHN GOODWIN, Jr.

*Opinion filed December 22, 1897.*

1. EJECTMENT—*ejectment verdict not disturbed unless clearly against the evidence.* In the absence of errors of law an ejectment verdict will not be disturbed, where there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict.

2. INSTRUCTIONS—*when error in one series of instructions is cured by the other series.* The instructions given for both parties will be construed together, and when so considered, if they state the law correctly as a whole, the error that may appear in one series will be deemed corrected by the other.

APPEAL from the Circuit Court of Vermilion county;  
the Hon. F. BOOKWALTER, Judge, presiding.

SALMANS & DRAPER, for appellant.

D. D. EVANS, for appellee.

MR. JUSTICE CRAIG delivered the opinion of the court:

This was an action of ejectment brought by Peter Lourance, against John Goodwin, Sr., and John Goodwin, Jr., to the May term, 1896, of the circuit court of Vermilion county, to recover a strip of land forty rods long and seven feet and three inches wide at the north end and tapering to a point at the south end. At the October term following, the suit was dismissed as to John Goodwin, Sr., and an amended declaration filed, describing the premises as "commencing at a stone at the south-west corner of the north-east quarter of section 7, township 21, range 12, west, Vermilion county, Illinois; thence forty rods north; thence west seven feet and three inches to center of hedge row; thence southerly to the place of beginning." The defendant, John Goodwin, Jr., pleaded

the general issue and a special plea, verified by affidavit, denying possession of the premises described in the declaration. A trial was had before a jury, and a verdict rendered in favor of the defendant. A motion was made for a new trial for cause, which was overruled by the court and judgment rendered upon the verdict. The plaintiff brings the record here by appeal.

It appears from the record that appellant, Peter Lourance, was the owner of the north-east quarter of the north-east quarter of section 7, containing forty acres, from October 7, 1874; while appellee, John Goodwin, Jr., was the owner of the north-west quarter of the north-east quarter and the north half of the north-west quarter of said section 7, by a conveyance from his father, John Goodwin, Sr., who had acquired title to it by deed from the master in chancery April 15, 1869. The two forty-acre tracts lie opposite each other, and the controversy arises over the division line running north and south between them. Appellant contends that a hedge row, thrown up about 1868, was the division line, and that he and his grantors had occupied the land east of the hedge for more than twenty years, while appellee denies that there was any agreement or consent that the old hedge was the line, or that appellant had occupied the strip up to the old hedge during the period contended for by him; alleges that a survey was had in May, 1891, which gave Lourance forty acres—all the land he claimed; that a stone was planted at the north-east corner of the west half of the north-east quarter of section 7, and the old stone was found at the south-west corner of the north-east quarter; that another survey was made in 1894, showing part of the hedge on the south end was on the line, but most of the hedge on the north part was west of the line; that appellee was present when the survey was made, and appellant came to where the surveyor and appellee were, at the north-west corner of the land; that in a conversation appellee admitted the survey was right,

and that a fence was built on the line surveyed, in June or July, 1895, and that it was by consent of appellant.

On the trial of the cause many witnesses were called as to the location of an old rail fence in 1868, and to show that the rail fence was moved a few feet west to give room to set a hedge row. Other testimony was given showing that the hedge never extended to the north line, but there was a gap of about fifty-five feet at said north end, while other gaps were found in other parts of the hedge. A certain stone at the south-west corner was admitted by both appellant and appellee to be on the dividing line between these two tracts of land. Much testimony was given on the question as to whether the hedge had been recognized as the line, and there was a conflict in the testimony as to whether appellant had occupied the strip up to the hedge row. The evidence fails to show an agreement or consent that the old hedge row should be the division line between the adjacent owners.

Appellee swore to having the following conversation with appellant: "Well, we talked about that after that. There was no fence to speak of that would hold anything. I wanted to put in a new fence on my part of the forty, and I said: 'I want to put in my half of the fence and I reckon you want to put in yours; I will have that hedge cut down; I don't suppose you will want to do it, as it is on my land.' He said, 'Jack, I reckon the survey is right; don't you?' I said I believed it was, as much as I believed anything in the world. 'Well,' he said, "give me all the time you can, for," he says, "it seems like everybody is crowding me," and I said, 'all right.' This was in the fall of the year, and I said then we will let it run on through winter; we wouldn't leave any stock in there until after we had pastured the stock, and then I wanted to burn it out, and we talked about that and he made no objection, and we quit that way. That, I think, was in October." While this conversation was to a certain extent denied by appellant, still the jury had a right to

believe appellee if they saw fit. If they believed appellee they must believe that the hedge was cut and the new fence built with the consent of appellant, which is inconsistent with the theory contended for by appellant that the hedge was recognized as the division fence.

Without attempting to review the testimony of the various witnesses, but after a full examination of the record, we find it conflicting on many points. The real controversy is one of fact, and it is the province of a jury to decide all questions of fact. This court said in *Illinois Central Railroad Co. v. Gillis*, 68 Ill. 317: "If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize a verdict, notwithstanding it may appear to be against the strength and weight of the testimony." (*Johnson v. Moulton*, 1 Scam. 532; *Stickle v. Otto*, 86 Ill. 161; *Louisville, Jacksonville and Chicago Railroad Co. v. Terhune*, 50 id. 151; *Roney v. Monaghan*, 3 Gilm. 85; *O'Reily v. Fitzgerald*, 40 Ill. 310.) In the case of *Tolman v. Race*, 36 Ill. 472, which was also an action of ejectment, the question presented on the trial was as to what was the boundary between adjoining quarter sections of land and the true location of a certain corner, and on these questions there was much conflict in the testimony. This court said (p. 477): "It is the peculiar province of a jury to weigh evidence and reconcile it if possible, or if that cannot be done, then to decide according to the weight of the evidence as it may appear to them. They have so done in this case, and we cannot say their verdict is so manifestly against the evidence as to justify this court in setting it aside."

It is urged on the part of appellant that the court erred in giving defendant's fourth and fifth instructions. We fail to see such inaccuracy in the fourth instruction

of defendant as could have misled the jury. The fifth instruction is open to criticism in failing to state that plaintiff might include the possession of his grantors with his own possession, to constitute the required twenty years. The rule is, as held in *Lawrence v. Hagerman*, 56 Ill. 68, "that the instructions given for the plaintiff and defendant must be construed together, and when so considered, if they state the law correctly as a whole, the error that may appear in one series will be deemed corrected by the other."

Plaintiff's third instruction was as follows:

3. "The court instructs the jury, if you believe, from the preponderance of the evidence, that the grantors of the plaintiff held the open, notorious, adverse, hostile, peaceable, uninterrupted and continuous possession of the land in question for some time, under claim of ownership thereto, and that they conveyed one from another down to the plaintiff herein, and that under said conveyance the plaintiff took possession of the land in question and held the open, notorious, adverse, hostile, peaceable, uninterrupted and continuous possession thereof, under claim of ownership, from the time of such conveyance to the time it is alleged in the declaration that the defendant took possession thereof, and that such possession of the said grantors of the plaintiff and the possession of the plaintiff together amount to a period of twenty years or more prior to the time it is alleged in the declaration that the defendant took possession thereof, then the plaintiff would be the absolute owner of the said land, then, if you further believe, from the preponderance of the evidence, that the defendant took and unlawfully withheld from the plaintiff the possession thereof, as alleged in the declaration, then you should find a verdict for the plaintiff."

In this instruction the jury are expressly told that the plaintiff's grantors' possession and the plaintiff's possession may be considered together in making up the period

of twenty years, which, taken in connection with defendant's fifth instruction, must be held to have modified it to that extent.

The refusal to give the first and second of plaintiff's instructions was not error, for the reason that the substance of them was embodied in other instructions given.

Finding no material error in the record the judgment will be affirmed.

*Judgment affirmed.*

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CARMEN SEVER

v.

ELIZA LYONS.

*Opinion filed December 22, 1897.*

1. JUDICIAL NOTICE—in determining extent of homestead exemption courts will judicially notice subdivisions. Where a person entitled to a homestead exemption is the owner of more than one lot, the court will take judicial notice of the subdivision of town and city property into separate blocks and lots, for the purpose of determining what land is covered by the exemption.

2. HOMESTEAD—homestead embraces entire lot on which the residence is located. The homestead exemption is not limited to the portion of the lot covered by the dwelling, but embraces the whole lot upon which it stands, if owned by the householder, together with the buildings upon such lot, whether used for carrying on business or deriving income by way of rent.

3. SAME—homestead does not embrace adjoining lots occupied by tenants though enclosed with residence lot. The homestead exemption does not extend to a lot adjoining the one on which the residence stands, which is occupied by houses leased to tenants residing there with their families, although such lot is enclosed with the residence lot.

4. EVIDENCE—it is competent to show that residence covers more than one lot. One claiming a homestead may show that his residence covers more than one legal subdivision, and that two or more lots, or a town lot and tract of farm land adjoining, in the same enclosure, though constituting separate tracts or lots, are occupied as one parcel of land, constituting a single residence, within the meaning of the statute.

CRAIG, J., dissenting.

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APPEAL from the Circuit Court of Iroquois county; the Hon. JOHN SMALL, Judge, presiding.

MORGAN & OREBAUGH, for appellant:

Land exempt as a homestead must be the spot on which the debtor claims a residence and must be the home of the family. *Hill v. Bacon*, 43 Ill. 477; *Kitchell v. Burgwin*, 21 id. 44; *Gardner v. Eberhart*, 82 id. 316.

Occupancy by a tenant and claiming the land as a homestead will not entitle the homestead claimant to the benefit of the statute. *Kitchell v. Burgwin*, 21 Ill. 44.

The statutory term "occupied as a residence," means that the premises must be the home of the party claiming the homestead right. *Potts v. Davenport*, 79 Ill. 458.

A house built on land on which the owner himself lives, and rented continuously to another, without ever having been used in connection with his own house or for any household or domestic purpose, or as a place of abode for any one of his own family, is not a part of the homestead, though inclosed by the same fence. Nor can the owner's intention to make it a part of the homestead have that effect. *McDonald v. Clark*, 19 S. W. Rep. 1023.

FLEMING R. MOORE, C. H. PAYSON, and NELLY B. KESSLER, for appellee:

By the statute every householder having a family shall be entitled to an estate of homestead to the extent in value of \$1000 in the farm or lot of land, and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence. Hurd's Stat. chap. 52, sec. 1.

The homestead exemption provided by statute takes in the entire lot upon which the debtor resides, whatever else may be there and for whatever else used, if its value is less than \$1000. *Hubbell v. Canady*, 58 Ill. 425.

The intention of the legislature in enacting the Homestead Exemption law was not to save a mere shelter for



the debtor and his family, but it was to give him the full enjoyment of the whole lot of ground exempted, to be used in whatever way he might think best for the occupancy and support of his family, whether in the way of cultivating it or by the erection of buildings upon it, either for carrying on his own business or for deriving income in the way of rent. *Stevens v. Hollingsworth*, 74 Ill. 202.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee is the owner of fifty-five hundredths of an acre off of the north side of lot 5, in block 3, of Vennum's addition to Milford, and has occupied the same, and the dwelling house situated thereon, with her husband and children, as a residence and homestead, for ten years last past. She is also the owner of lot 4 in said addition, adjoining said fraction of lot 5. There are two dwelling houses on lot 4, built several years ago, which have been continuously leased by her to tenants who were the heads of families and resided with the same in said houses, respectively. Lot 4 and the fraction of lot 5, with the three residences thereon, are within one inclosure and not worth \$1000. While the premises were so situated they were sold on execution against appellee, and the certificate having been assigned to appellant, he received a sheriff's deed for the same. Since receiving the sheriff's deed, appellant has tendered to appellee, and still offers to her, a deed of the fraction of lot 5 on which she resides, which deed she refuses to receive. Appellee filed her bill in the circuit court of Iroquois county against appellant, alleging that the entire premises were exempt as her homestead, and praying that the sheriff's deed should be declared void as a cloud upon her title.

The facts as above stated were agreed upon by written stipulation, and the court, upon such agreed state of facts, found for appellee and declared the sheriff's deed null and void.

The homestead exempted by the statute is an estate to the extent in value of \$1000 in the farm or lot of land and buildings thereon occupied as a residence. It embraces the whole lot of ground and the house and out-buildings occupied as a residence, together with any other buildings upon such lot, whether for carrying on business or deriving income in the way of rent. In such case the exemption is not limited to the portion of the lot covered by the dwelling, but by the terms of the statute extends to the whole lot. (*Hubbell v. Canady*, 58 Ill. 425; *Stevens v. Hollingsworth*, 74 id. 202.) Where the person entitled to homestead is the owner of more than one lot, the court will take judicial notice of the subdivision of town and city property into separate blocks and lots, for the purpose of determining what lot of land is covered by the exemption. (*Hill v. Bacon*, 43 Ill. 477; *Gardner v. Eberhart*, 82 id. 316.) It is competent, however, to prove that a residence covers more than one legal subdivision, and that two or more lots, or a town lot and tract of farm land adjoining and in the same enclosure, although constituting separate legal tracts or lots, are occupied as one lot of land constituting a single residence, within the meaning of the statute. (*Thornton v. Boyden*, 31 Ill. 200; *Boyd v. Fullerton*, 125 id. 437.) In this case, the fifty-five hundredths of an acre, part of lot 5, is the lot of land occupied as a residence by appellee. Lot 4 is a distinct and separate lot, occupied under leases by other heads of families residing therewith. It is impossible that appellee should be in the occupancy of that lot with her family as a residence while she occupies a separate lot as a homestead and it is so occupied by her tenants as their residences. It is in the same enclosure with her residence, but that fact alone is not sufficient to annex a separate lot not occupied by her to her homestead.

The decree will be reversed and the cause remanded.

*Reversed and remanded.*

MR. JUSTICE CRAIG, dissenting.

JOHN EHDIN

v.

FRANCIS T. MURPHY *et al.**Opinion filed December 22, 1897.*

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| d90a | *267 |

1. **MECHANICS' LIENS**—*when statement of account filed with clerk is not sufficient to create lien.* Where a contract for brick and stone work fixes one price for common brick, another for pressed brick, a price per cord for stone work and a rate per foot for cut stone, a statement of account filed with the circuit clerk which merely gives the balance due under the contract, without specifying the amounts of the different materials furnished and the sum due for each, is not a sufficient compliance with section 4 of the Mechanic's Lien act (Laws of 1887, p. 219,) to entitle the contractor to a lien.

2. **SAME**—*when statement of times when material and labor were furnished is sufficiently specific.* Where a contract for erecting a building is entire, a statement of account which gives the times at which materials and labor were furnished as covering a period from the date of the contract to its completion is sufficiently specific, under section 4 of the Mechanic's Lien law of 1887.

3. **SAME**—*clerk's docket of claims for liens does not take the place of the claim itself.* The docket in which the circuit clerk is required to keep a record of claims for mechanics' liens filed with him is intended only as a convenient reference to the claim, and does not take the place of the claim itself as notice to the public.

*Ehdin v. Murphy*, 69 Ill. App. 555, affirmed.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

JOHN E. ANDERSON, for plaintiff in error.

LINDEN & DEMPSEY, for defendants in error.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court:

On December 28, 1892, Annella Rood, who was the owner of certain premises in Chicago, entered into a contract, through Francis D. Rood, her husband and agent,

with plaintiff in error and John Anderson, who were then partners, to lay the brick and stone work in a five-story brick building which she was about to erect upon said premises. The contract was in the form of a written proposition and acceptance, as follows:

"CHICAGO, ILL., Dec. 28.

"I agree to lay all common brick in the building to be erected by F. D. Rood at Forty-sixth street and Woodlawn avenue, according to the plans of F. J. Norton, for \$5.50 per thousand, kiln counted, the walls to be continuous on the two sides of the building. If air courts of wood are built in the sides then I am to have \$6 per thousand. I will lay all stone foundation for \$7 per cord, quarry measure, and also set all cut stone in front at fifteen cents per foot, all openings to be counted out. If pressed brick are laid on side walls for twenty feet, more or less, at the front, I am to have \$18 per M for laying the same, and will furnish the color for the laying. Payments to be made every two weeks as work progresses. I furthermore agree to complete the mason work on said building within thirty working days.

Accepted: F. D. Rood."

JOHN ANDERSON & EHDIN.

On January 2, 1893, the partnership was dissolved and the contract assigned by the retiring partner, Anderson, to plaintiff in error. After the completion of the contract plaintiff in error filed his claim for a lien, June 19, 1893, with the clerk of the circuit court, as follows:

"John Ehdin, being first duly sworn, on oath says that he is the claimant herein, and that the attached exhibit A is a just and true statement of the account due him from the said Annella Rood and F. D. Rood for labor furnished said Annella Rood and F. D. Rood at the times in said statement mentioned, which various amounts are due and payable to him from and after the respective dates thereof; and affiant says that the labor in said statement mentioned was used in the construction and building and improvement of a brick and stone building situate upon the following described premises in the county of Cook and State of Illinois, to-wit: Lot 27 and the south half of lot 28 of H. J. Furber's subdivision of lots 7 and 8 of Lyman's subdivision; also 1 and 6 of Waite's subdivision, lots 4 to 10 of subdivision of lots 7 and 8, Lyman's subdivision south-east fractional quarters of section 2, township 38, range 14, in the city of Chicago. And affiant says that there is now due and owing

to said John Ehdin from said Annella Rood and F. D. Rood, at whose request said labor was furnished as aforesaid, after allowing him all just credits, deductions and set-offs, the sum of \$1662.29, for which amount said John Ehdin claims a lien upon the above described premises.

JOHN EHDIN.

"Subscribed and sworn to before me this 19th day of June,  
A. D. 1893.  
[Seal.]

S. H. HERBESON, *Notary Public.*"

"Exhibit 'A.'"

"*Annella Rood and F. D. Rood, to*

*John Ehdin, successor to Anderson & Ehdin, Dr.*

"To building and construction brick work, setting stone front, sills, etc., as per contract dated December 28, 1892, which said work was performed from said December 28, 1892, up and to the 2d day of June, 1893, upon the premises belonging to said Annella Rood and F. D. Rood, at Woodlawn avenue and Forty-sixth street, in the city of Chicago, more particularly described in claimant's affidavit herein.....

\$5770.85

Credits.....

4108.56

Balance due..... \$1662.29"

Defendants in error are purchasers of the premises, and in a proceeding to enforce mechanics' liens against the property the issue as to the lien claimed by the plaintiff in error was referred to a master in chancery, who heard the evidence and reported in his favor. Defendants in error filed exceptions to the master's report, which were sustained by the court, and a decree was entered finding that plaintiff in error was not entitled to any lien. He sued out a writ of error from the Appellate Court for the First District, and in that court the decree of the circuit court was affirmed.

By section 4 of the law relating to mechanics' liens, as amended in 1887, the creditor or contractor was required to file with the clerk of the circuit court "a just and true statement or account or demand due him after allowing all credits, setting forth the times when such material was furnished or labor performed," and such statement was a prerequisite to bringing a suit to en-

force the lien. So far as the times when the material was furnished or labor performed are concerned the contract was an entire one for all the brick and stone work of the building, and the statement gave the period during which such entire contract was performed. It was sufficient in that respect. *Hayes v. Hammond*, 162 Ill. 133; *Moore v. Parish*, 163 id. 93; *Grace v. Oakland Building Ass.* 166 id. 637.

But the contract in this case did not fix a specific sum or price for the whole work, as was the case in *Moore v. Parish*, *supra*, but fixed one price per thousand for common brick and a different one for pressed brick, a price per cord for stone foundation, and a rate per foot for cut stone. It therefore necessitated an account of the brick of each kind and the stone which were laid in the building, and was like the contract in *Grace v. Oakland Building Ass.* *supra*, in which the items of material were set out in full in the statement. There were therefore items to be set down of the amount of brick and stone to be charged for at the prices agreed upon in the contract, like any other account for lumber or other materials furnished where only the price is agreed upon and the amount due is to be determined by the amount furnished. A plaintiff could not recover on such a contract without proof of the amount of each kind of brick and stone, and the statement of the balance due filed in this case was neither the account of plaintiff in error against the Roods nor a statement of it as required by law. The claim that the statute gave the privilege in the alternative to claimant to file a "statement or account or demand" will not avail in this case, because the demand consisted of an account, and a statement of the claim would be a statement of an account.

It is argued that the docket required to be kept by the clerk, which states only the amount due, is the notice intended by the law to creditors and purchasers, and where the docket contains, as it did in this case, the particulars required to be entered on it, nothing further is necessary. This claim was disposed of in *McDonald v. Rosengarten*, 134

Ill. 126, where it was held that the only purpose of the docket is to furnish a convenient and ample reference to the claim, and that it does not take the place of the claim itself as notice to the public. A docket containing all that the statute required would not be a sufficient notice of the claim in this case.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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THE UNION STOCK YARDS AND TRANSIT COMPANY

v.

JOSEF KARLIK.

*Opinion filed December 22, 1897.*

1. EVIDENCE—*what proof not necessary to support allegation that the injury occurred in a public street.* To support an allegation that the place of the plaintiff's injury was in a public street it is not necessary that a plat or other documentary evidence should be introduced, nor the legal existence of the street shown by proof of dedication or prescription.

2. SAME—*what sufficient to go to jury as tending to prove that injury occurred in a public street.* Statements of witnesses that plaintiff's injury occurred in a public street, naming it, and that hundreds of people passed along there daily, are sufficient to go to the jury as tending to show that the injury occurred in a public street, although it appears from their testimony that there were no sidewalks, and that the entire space for several blocks was occupied by railroad tracks, and that only foot passengers traveled there.

*Union Stock Yards Co. v. Karlik*, 68 Ill. App. 604, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. HENRY V. FREEMAN, Judge, presiding.

FRANK O. LOWDEN, and ROBERT MATHER, for appellant.

JONES & LUSK, for appellee.

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Mr. JUSTICE WILKIN delivered the opinion of the court:

Appellee brought this action on the case, against appellant, in the Superior Court of Cook county, to recover damages for the loss of his left arm through the negligence of its employees. On the trial he recovered a judgment for \$2000 and costs of suit, which the Appellate Court affirmed.

Each of the four counts of the declaration alleges that the accident occurred on Loomis street, in the city of Chicago, upon which plaintiff was walking, exercising due care, etc. The act of negligence charged against the employees of the company in the first count is, failing to ring a bell as required by a city ordinance; in the second, starting a locomotive and train of freight cars without ringing the bell or sounding the whistle; in the third, failure to have a brakeman stationed on the rear car of the train while backing toward plaintiff; and in the fourth substantially the same as in the third. The plea was, not guilty, and the trial by jury. At the close of all the evidence the defendant submitted an instruction to the jury to find the defendant not guilty, which was refused.

There is no controversy as to the fact that plaintiff was run against, thrown down and his left arm run over by a freight car pushed backward on one of the defendant's tracks, between Forty-third and Forty-second streets, in the city of Chicago, so mangling the arm as to render amputation at or near the shoulder joint necessary, and it is admitted by plaintiff that at the time he was struck he was walking upon or across the railroad tracks.

The defendant offered no evidence whatever upon the trial, and no claim is made that the court erred in the admission of that offered by the plaintiff, nor is it contended that error was committed upon the trial in the giving or refusing of instructions, except in refusing the peremptory instruction to find for the defendant. The questions for our decision therefore arise on that refusal.



Plaintiff's case, as made by his declaration, is, that the place where he was injured was a public street, upon which he had a lawful right to be, and that the defendant is liable for all damages resulting to him from the injury, if it was occasioned by the defendant's negligence, as charged, he being in the exercise of due care. Appellant insists the peremptory instruction should have been given because the proof wholly failed to prove that the plaintiff used due and proper care to avoid the injury, and particularly because there is no proof in the record tending to establish the alleged fact that he was upon a public street when struck.

We do not think that the first contention demands extended notice. If the plaintiff was lawfully upon the defendant's track when struck, it cannot, we think, be said that there was not sufficient evidence of care on his part to make it a question properly for the jury.

We agree with counsel that there is not such proof in this record as ought to charge the defendant company with willful or wanton conduct, or gross negligence amounting to willfulness or wantonness. Therefore plaintiff could not recover without proof that he was at the time lawfully upon the track. The controlling question must therefor be, is there any evidence in the record fairly tending to prove that he was injured while upon a public street.

The general direction of the defendant's tracks at the place of the injury is north and south. They are crossed by Forty-second street, and one block south by Forty-third street, both running east and west. The streets in that part of the city running east and west are numbered from the canal south, the first being Fortieth street, the next Forty-first, the next Forty-second, the next Forty-third, and so on to Forty-seventh. It seems clear enough from the evidence that Loomis street extends north from Forty-seventh to Forty-fifth street, and from the north side of the canal northward. From Forty-fifth street

north to Fortieth the defendant's tracks are laid, as we understand the evidence, on a line with Loomis street, north and south, and the question is, does the street extend over the space occupied by the tracks.

One Josef Kasperek, testifying on behalf of plaintiff, said: "I saw him get hurt, about four years ago, on Loomis street, between Forty-second and Forty-third streets. The accident happened on Loomis street, between Forty-second and Forty-third streets." In answer to the question, "State whether that street is used by the public as a highway for people to pass on," he said: "Well, there are people passing there all through the day. There is an average of 1800 to 2000 people passing along there each day, going to and from work." On cross-examination he was asked, "You don't know, of your own knowledge, that it is a public street?" and answered, "It is always called——" but was stopped by counsel for defendant, and what he had said was stricken out as not responsive to the question; whereupon, on being required to again answer, he said, "no." On re-direct examination he was asked, "What makes you call it Loomis street?" but an objection to the question was sustained, on the ground, as stated by the court, "if he did not know, it was immaterial what made him call it Loomis street." Plaintiff, testifying on his own behalf, was asked, "Where did this accident occur, Mr. Karlik?" and he answered, "Between Forty-second and Forty-third streets, on Loomis." On cross-examination he said there was no planking along said tracks south of Forty-second street. Kasperek, being re-called, was asked by the court, "Is the space between Forty-third street on the south and Forty-first street on the north used for any other purpose except railway tracks?" and answered, "People walk that way." In answer to the question, "Any teams go along there?" he stated no teams went along there and that there were no sidewalks. Another witness testified from 1600 to 2000 people passed over the place daily, going to and return-

ing from work, and had done so to his knowledge for several years. It was shown that there are four railroad tracks there, about nine feet apart. The one on the west is called Nels Morris' switch or side-track; the next, the Union Stock Yards and Transit Company's switch track; the next, the Stock Yards track, and the one farther east, Armour's switch track. Morris and Armour each had buildings along their tracks, from which they loaded cars.

The foregoing is all the testimony, so far as we have been able to discover or which has been pointed out, tending to prove that the place of the accident was in a public street. It must be admitted that it is meager and unsatisfactory. But that is not the question with which we have to deal. If, with all its reasonable inferences and intendments, the evidence tends to prove the existence of a public street at the place, we cannot say, as a matter of law, that the trial court erred in not directing the jury to find for the defendant.

What is competent proof of the existence of a public street or highway in a case like this? It has never been held that the introduction of a plat or other documentary evidence that a street has been legally laid out and opened, or that it has been established by dedication or prescription, is necessary. Any proof which tends to show that it is used and called or recognized as a public street is competent. (*Chicago and Alton Railroad Co. v. Heinrich*, 157 Ill. 388.) Generally it is sufficient to prove that the injury occurred on a certain street by name, as "State street," "Clark street," etc. Here plaintiff, and another testifying on his behalf, expressly state that the accident occurred on Loomis street, but it is insisted that the fact that they speak of the place as Loomis street amounts to nothing, because they show, on cross-examination, that they had no personal knowledge of the existence of the street. A witness may not, in one sense, know, of his own knowledge, of the location of a street, and yet be warranted in calling it a street. If the question was whether

it had been legally established, few witnesses could say they know, of their own knowledge, of its existence, however public it might be; but the question being as to its use, and whether it was so recognized, they could very properly say it was a street. In this case we think the statements of these witnesses that the accident occurred on Loomis street are competent testimony tending to show that the *locus in quo* was in a public street, and that the cross-examination of the witnesses did not have the effect to entirely destroy the tendency of their statements.

But we think the evidence of the witnesses who testified as to the use of the streets north and south of the place of the injury, and that large numbers of people passed over that place daily, also tended to prove that it was a public street. In the absence of anything to indicate that the railroad tracks were put down between Forty-fifth street and the canal before Loomis street was laid out, it may reasonably be inferred the street was laid out continuously, extending between those streets; and it being competent to prove the existence of a street, in this class of cases, by evidence showing that it is so used, testimony that 1500 to 2000 people walked along there each day tended to show there was a public street at that place. That such travel was only by people on foot would make the evidence of less weight than if it had been shown that it was also traveled by teams and vehicles, but would not render it incompetent. And the same is true as to the fact that sidewalks had not been constructed on it at that place. The number and location of the railroad tracks, as well as the character of the business on either side of those tracks, tend to show that teams could not conveniently pass over it, and that there was no necessity for their so doing.

The doctrine of *Wabash Railroad Co. v. Jones*, 163 Ill. 167, and of the authorities on which the case is based, can have no proper application to the question involved here. The question in those cases was whether the mere fact

that persons were in the habit of wrongfully using the railroad right of way and tracks as a foot-path justified the injured parties in being there, or changed their positions from that of trespassers to that of persons rightfully on the tracks, and it was held it did not. Thus it was said in the *Godfrey case*, 71 Ill. 500 (on p. 507): "Because the company did not see fit to enforce its rights and keep people off its premises, no right of way over its ground was thereby acquired. It was not bound to protect or provide safeguards for persons so using its grounds for their own convenience." And in *Illinois Central Railroad Co. v. Hetherington*, 83 Ill. 510, it was said (p. 513): "The fact that persons residing in the locality where the accident occurred had been in the habit of traveling upon the right of way of the defendant, and no measures had been taken to prevent it, did not change the relative rights or obligations of the deceased or the railroad company." To the same effect are *Blanchard v. Lake Shore and Michigan Southern Railroad Co.* 126 Ill. 416, and *Illinois Central Railroad Co. v. Noble*, 142 id. 578.

The plaintiff in this case did not attempt to justify his being upon the track of the defendant upon the ground that others had been in the habit of passing over the same. His averment was that the place was in a public street, and the evidence that many persons had daily passed over it was for the purpose of proving that averment. His theory was, that neither he nor the many others who passed over the ground were trespassers, but rightfully there. Under the issues in the case, testimony that hundreds of persons traveled over the place of the injury was competent, as tending to prove that it was a street, and we think it tended to do so.

In our opinion the trial court did not err in refusing to take the case from the jury. The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

H. H. WALKER *et al.*

v.

THE PEOPLE *ex rel.* Kochersperger, County Treasurer.*Opinion filed December 22, 1897.*

1. SPECIAL ASSESSMENTS—*construction of connected system of sewers and drains is not a "double improvement."* An assessment ordinance is not invalid, as providing for a double improvement, because it provides for the construction of a connected system of drains and sewers along the various streets of the municipality, instead of being confined in its application to a single street.

2. SAME—*when ordinance is not void for uncertainty.* An ordinance providing for a connected system of drains and sewers, which specifies the various streets to be improved, the grade of the sewer in each street, its internal dimensions, materials of which it is to be constructed and the character of the work in detail, and which, in addition, expressly approves the plans, specifications, maps and profiles on file with the clerk is not void for uncertainty.

3. SAME—*when provision of ordinance in conflict with statute will not render the ordinance invalid.* A provision in an ordinance for street improvement by which the board of trustees reserve the right to reject "any proposal, at their discretion," is in conflict with section 50 of article 9 of the City and Village act. (Rev. Stat. 1874, p. 239.) But such provision will be regarded as nugatory and the ordinance valid where it does not appear that the board of trustees ever acted thereunder.

4. SAME—*objection that the oath administered to commissioners was defective must be made at confirmation.* An objection that the oath administered to the commissioners appointed to make the assessment was defective must be interposed at the application for confirmation, and comes too late on application for judgment of sale for the delinquent assessment.

5. SAME—*separate ordinance is not necessary to provide for division of assessment into installments.* An ordinance providing for the construction of an improvement to be paid for by special assessment may provide for the division of the assessment into installments. A separate, subsequent ordinance is not required.

6. SAME—*dismissal of petition as to part of property does not release all.* The fact that a city voluntarily dismisses a special assessment petition against particular lots, the owners of which appeared and filed objections to the confirmation, does not relieve the remaining lot owners who permitted the judgment to go by default from liability for the assessment.

7. *SAME—when objection comes too late.* An objection that by the dismissal of an assessment petition against part of the lots those remaining are assessed more than their proportionate share of the cost of the improvement, comes too late when first made on application for judgment of sale for the delinquent assessment.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

GEORGE H. TAYLOR, ALBERT MARTIN, and STEELE & ROBERTS, (F. W. YOUNG, of counsel,) for appellants.

WILLIS MELVILLE, (AMERICUS B. MELVILLE, of counsel,) for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an application by the county collector of Cook county for judgment against delinquent lands for a special assessment levied and assessed by the village of Grossdale for the construction of a connected system of drains and sewers in and along the streets and avenues of the village. The appellants, Henry Seiling, James Kunst, James Lang, H. H. Walker and George H. Taylor, among others, appeared in the county court and filed objections to judgment against certain lots owned by them. On the hearing the objections were overruled, and they appealed.

It is first contended by the appellants that the ordinance is invalid for the reason it provides for a double improvement. The ordinance providing for the improvement is as follows:

"An ordinance to establish, determine and define the nature, character, locality and description of a connected system of drains and sewers in and along the streets and avenues of the village of Grossdale, Cook county, State of Illinois, and to approve the plans, specifications, maps, profiles, drawings, etc., therefor, and to provide for the construction of said improvement.

*"Be it ordained by the President and Board of Trustees of the Village of Grossdale:*

"SECTION 1. That the nature, character, locality and description of a connected system of drains and sewers in and along the streets and avenues of the village of Grossdale be and the same are hereby established, determined and defined, and the plans, specifications, maps, profiles, drawings, etc., therefor, as herein contained and herewith and heretofore filed in the office of the village clerk of said village, are hereby approved.

"Sec. 2. That the location of such connected system of sewers is hereby established in and along the streets and avenues of said village, as follows: On and along a line fifteen feet west of and parallel with the east line of Burlington avenue, from its connection with the proposed sewer in Garfield avenue to a point four hundred and fifty feet north of the center line of Garfield avenue." (Then follows a long list of the streets and avenues in the village in and upon which sewers are to be constructed.)

If an incorporated city or village, in providing sewers and drains for the incorporation, is restricted, in the passage of an ordinance, to one street, and to that alone, then this ordinance would be invalid; but, on the other hand, if a city or village has the right, in one ordinance, to provide for a connected system of sewers and drains in and along the streets and avenues of the incorporation, whereby its various streets and avenues may be improved, then the ordinance in this case may be sustained. Here, as we understand the ordinance, the village undertook to establish by one ordinance a connected system of drains and sewers for the entire village. The improvement was in no sense a double improvement, but was a single improvement, extending over different streets in the village. A similar question was raised in *Prout v. People ex rel.* 83 Ill. 154, and *Payne v. Village of South Springfield*, 161 id. 285, and ordinances similar to the one here in question were sustained.



It is next contended that the ordinance is void for uncertainty. Upon an examination of the ordinance it will be found that it specifies the various streets in which the improvement shall be made. It gives the internal dimensions of the improvement, the grade of the sewer in each street, material of which it shall be constructed, and the character of the work in detail. In addition, the ordinance in express terms approves the plans, specifications, maps and profiles on file in the office of the village clerk. In view of the various specifications of the ordinance, in connection with the plans on file in the office of the clerk, the ordinance cannot be regarded as void for uncertainty.

It is also contended that the ordinance is void because it contains the following provision: "The board of trustees reserves the right to reject any proposal, at their discretion." Paragraph 164 of the City and Village act (Rev. Stat. p. 239) provides: "All contracts for the making of any public improvements, to be paid for, in whole or in part, by a special assessment, and any work or other public improvement when the expense thereof shall exceed \$500, shall be let to the lowest responsible bidder, in the manner to be prescribed by ordinance." It is apparent that the section or clause of the ordinance is in conflict with the statute, and, being in conflict with the statute, it is nugatory. But it does not vitiate the balance of the ordinance. The clause in question may be rejected as being in conflict with the statute and leave the balance of the ordinance in force. If the board of trustees had ever acted under the section of the ordinance in question, and had rejected a bid made by the lowest responsible bidder, a different question might be presented; but, so far as appears, no action was ever taken by the board of trustees under the ordinance. A section of an ordinance similar to the one involved was before the court and condemned in *Lake Shore and Michigan Southern Railway Co. v. City of Chicago*, 144 Ill. 391, but in that case the judgment was reversed on other grounds.

It is next claimed that the commissioners appointed to make the assessment did not take the oath prescribed by the statute. The oath administered was as follows: "We, the undersigned commissioners, appointed, etc., do solemnly swear that we will a true and impartial assessment make of the cost of the said improvement upon the village of Grossdale, *or any* property benefited by said improvement, to the best of our ability and according to law." The oath conforms to the language of the statute, except the words "or any" are used before the word "property," when the words required should be "and the." If the objection interposed had been made on the application to confirm the assessment it might have been sustained; but on an application to confirm a special assessment, where the court has jurisdiction to render the judgment of confirmation, such judgment will conclude the land owner from questioning any of the proceedings had prior thereto in a subsequent application for judgment and order of sale of the premises. (*People v. Markley*, 166 Ill. 48.) Here the affidavit was defective, but the defect was not of such a character as to deprive the court of jurisdiction. In *Larson v. People ex rel.* (*ante*, p. 93,) it was expressly held that objection to a defective affidavit like the one in question must be made on the application to confirm the assessment, otherwise it will be regarded as waived.

It is next contended that the judgment is erroneous because it was provided by the ordinance under which the assessment was made, that the assessment should be divided into installments. Section 8 of the ordinance provided that said assessment shall be divided into and collected by installments, ten in number, in accordance with the provisions of an act of the General Assembly of the State of Illinois entitled "An act to authorize the division of special assessments in cities, towns and villages into installments," etc., approved June 17, 1893, in force July 1, 1893. The first section of the act referred to in

the ordinance is as follows: "That whenever the corporate authorities of any city, town or village have heretofore levied or shall hereafter levy any special assessment pursuant to law, it shall be lawful for such corporate authorities, at any time prior to the commencing the collection thereof, to provide by ordinance that said assessment be divided into installments, not more than seven in number, the first of which installments shall be due and payable on and after confirmation thereof, and the second installment one year thereafter, and so on until all are paid; but such division shall be so made that the first installment shall include all the fractional amounts, leaving each of the remaining installments equal in amount and multiples of one hundred dollars, which said assessment and installments shall bear interest from and after thirty days succeeding the date of confirmation, at the same rate and be collected in like manner as is now provided by law: *Provided*, that any special assessment levied for building sewers and laying water mains may in like manner be divided into not exceeding ten installments."

Under this section of the statute it is claimed that the village of Grossdale had no authority to divide the assessment into installments by the ordinance which provided for the improvement, but that the village could only do so by the passage of a separate ordinance after the assessment had been levied and a judgment of confirmation had been rendered. While there may be some doubt in regard to the meaning of the statute, we do not regard the construction contended for as sound. We think a fair construction of the language, "whenever the corporate authorities of any city, town or village have heretofore levied or shall hereafter levy any special assessment," was intended by the legislature to mean merely that whenever the corporate authorities have heretofore determined or shall hereafter determine to levy any special assessment, then they may provide, by ordinance,

for a division of the assessment into installments. If we are correct in this, then when the corporate authorities have determined to pass an ordinance, they may, as was done in this case, add a section dividing the assessment into installments. Nothing could be gained by waiting until the judgment should be confirmed before it was settled whether the tax-payer should be required to pay the entire assessment in one amount or whether it should be divided into installments. On the other hand, it would seem to be a much better practice to settle the matter when the ordinance for the improvement is passed, as was done here.

On the application for confirmation of the assessment it appears that the petition was dismissed as to some ninety-five lots which had severally been assessed by the commissioners, and it is claimed that as the petitioner voluntarily dismissed the petition as to these lots, and thus allowed them to escape the burden which had been placed upon them, the remaining lot owners cannot be held for the assessment. Under paragraph 144 of the City and Village act (Rev. Stat. p. 236,) any person interested in any real estate to be affected by the assessment may appear and file objections to the report of the commissioners. Paragraph 145 provides: "The hearing shall be conducted as in other cases at law, and if it shall appear that the premises of the objector are assessed more or less than they will be benefited, or more or less than their proportionate share of the cost of the improvement, the jury shall so find, and also find the amount for which such premises ought to be assessed, and judgment shall be rendered accordingly." Under paragraph 147 the court has authority, at any time before final judgment, to modify or change any assessment. If appellants' property was assessed more than it will be benefited or more or less than its proportionate share of the cost of the improvement, the proper place to raise that question and obtain the proper relief was in the

county court, on the application to confirm the assessment. So, also, if the dismissal of the petition as to ninety-five lots which had been assessed by the commissioners resulted in making appellants' assessment greater than their proportionate share of the cost of the improvement, the proper place to obtain relief was in the county court, or by an appeal from the judgment of confirmation, but no relief can be obtained on the application for judgment against appellants' lands.

The judgment of the county court will be affirmed.

*Judgment affirmed.*

## THE WEST CHICAGO STREET RAILROAD COMPANY

v.

LOUISA J. MANNING.

*Opinion filed December 22, 1897.*

1. CARRIERS—*proof of payment of fare not necessary to show relation of carrier and passenger.* Proof of payment of fare is not essential to establish the relation of passenger and carrier between the plaintiff and the defendant street railroad company, where the plaintiff entered the car in the usual way, conducted herself as a passenger, and was conveyed as such from where she boarded the car to where she was injured in attempting to alight.

2. SAME—*stopping street car at crossing—duty to parties getting on or off.* Servants in charge of a street car which has stopped at or near a street crossing must exercise reasonable care, before again starting the car, to see that passengers getting on or off the car are not in such a position as to be endangered by putting it in motion.

3. SAME—*ordinance for stopping cars at further crossing—duty of servants stopping car at nearer one.* The fact that a city ordinance provides that street cars stopping at street intersections shall stop at the further cross-walk, does not relieve those in charge of a car stopping at the nearer cross-walk from using reasonable care to see that persons attempting to get on or off will not be endangered by starting the car.

4. SAME—*stopping car at nearer cross-walk may be regarded as an invitation to alight.* Where a street car approaching a street intersection comes to a stop at the nearer cross-walk, passengers who have

170—27\*

170 417  
81a 147

170 417  
82a 138  
83a 316

170 417  
187 \*616

170 417  
fv7a \*187

170 417  
101a \*186

170 417  
104a \*611

170 417  
111a \*288

reached their destination may reasonably regard it as an invitation to alight, and persons desiring to become passengers may, without any necessary imputation of negligence, attempt to enter.

5. NEGLIGENCE—*questions of fact which are settled by the Appellate Court's judgment of affirmance.* Whether a street car was suddenly started while the plaintiff was attempting to alight, and whether the plaintiff was exercising ordinary care for her safety, are questions of fact, which are conclusively settled by the judgment of the Appellate Court affirming that of the trial court.

6. SAME—*person not required to use highest degree of care in alighting from street car.* An instruction, in an action against a street railroad company for injuries received by the plaintiff in alighting from the car, that the jury should find for the defendant if they believed, from the evidence, that the circumstances called for the exercise of the highest degree of care by the plaintiff, and that by its exercise the injury might have been avoided, is erroneous.

7. SAME—*what is ordinary care depends upon the circumstances of each case.* Where circumstances are such that an ordinarily prudent person would exercise a greater degree of care than under less threatening circumstances, such greater degree of care is but ordinary care under the particular circumstances.

8. SAME—*when instruction in action for negligence is properly refused.* In an action against a street railroad company for injuries received by plaintiff in alighting, an instruction that the passengers are presumed to know that the proper places to alight are at the further cross-walks, and that servants in charge of the car may assume that passengers, in alighting, will exercise reasonable care with reference to such knowledge, is properly refused.

*West Chicago Street R. R. Co. v. Manning*, 70 Ill. App. 239, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

ALEXANDER SULLIVAN, (EDWARD J. MCARDLE, of counsel,) for appellant:

Where an averment of a declaration descriptive of a material fact, which cannot be omitted without destroying the cause of action declared on, is put in issue, it must be proved as laid. *Railway Co. v. Friedman*, 146 Ill. 583; *Bloomington v. Goodrich*, 88 id. 558; *Moss v. Johnson*, 22 id. 633; *Bell v. Senneff*, 83 id. 122; *Davidson v. Johnson*, 31 id.

523; *Railroad Co. v. Morkenstein*, 24 Ill. App. 128; 1 Chitty's Pl. 227; Stephens' Pl. 236, 237; Starkie on Evidence, 570, 572, 389; 1 Greenleaf on Evidence, sec. 58; *Erragon v. Rutland*, 58 Vt. 128.

One who takes doubtful chances cannot complain of injury against another, unless, after his peril was discovered or was discoverable by due care, the defendant, by the exercise of due care, could have avoided it. *McClain v. Railroad Co.* 116 N. Y. App. 459.

For a disregard of the court's instructions by the jury its verdict should be set aside. *Higgins v. Lee*, 16 Ill. 495.

An instruction should not ignore, but be limited by, the pleadings and confined to the issues raised thereon, and if it does so the verdict should be set aside. *Railway Co. v. Shires*, 108 Ill. 617; *Mosher v. Rogers*, 117 id. 446; *Railroad Co. v. Snider*, id. 376; *Bourland v. Gibson*, 124 id. 605; *Assurance Co. v. Weaver*, 23 Ill. App. 95; *Railroad Co. v. Morkenstein*, 24 id. 128; *Swift & Co. v. Ruleigh*, 54 id. 45.

An instruction should not submit matters or facts of which there is no evidence. *Railroad Co. v. Parker*, 131 Ill. 557; *Railroad Co. v. Morkenstein*, 24 Ill. App. 128.

Different hypotheses of liability should not be submitted in a single instruction. *Railroad Co. v. Johnson*, 103 Ill. 512; *Wooley v. Lyon*, 117 id. 244.

Instructions should not omit an essential element. *Wooley v. Lyon*, 117 Ill. 244.

He who takes a hazardous step assumes the risk of all its perils and dangers. *Railroad Co. v. Hall*, 72 Ill. 222; *Simmons v. Railroad Co.* 110 id. 340.

Instructions should not summarize evidentiary facts. *Evans v. Dickey*, 117 Ill. 291.

Where one takes a hazardous course, care in proportion to the danger is requisite. Beach on Cont. Negligence, sec. 9, p. 22; *Barker v. Savage*, 43 N. Y. 191; *Railroad Co. v. Whitacre*, 35 Ohio St. 627; *Railroad Co. v. Olson*, 12 Ill. App. 245; *Railway Co. v. Reilly*, 40 id. 416; *Childs v. Railroad Co.* 33 La. Ann. 154; *Gumb v. Railway Co.* 53 N. Y. Sup. 466;

*Railroad Co. v. Houston*, 95 U. S. 697; *Miller v. Railway Co.* 42 Minn. 454; *New York v. Bailey*, 2 Denio, 433.

Custom does not justify a negligent act. *Pulsifer v. Berry*, 87 Me. 405.

HENRY D. BEAM, and WILLIAM R. RUMMLER, for appellee:

A peremptory instruction to find for the defendant is properly refused where there is evidence tending to establish a cause of action. *Steel Co. v. Schymanowski*, 162 Ill. 447; 59 Ill. App. 32; *Chalmers v. Schroeder*, 163 Ill. 459; 60 Ill. App. 519.

A party is not bound to prove matters which are merely surplusage. If the proof does not correspond with such matters the variance is immaterial. *Pennsylvania Co. v. Conlan*, 101 Ill. 93.

If the whole of an averment may be stricken out without destroying the plaintiff's right of action it is not necessary to prove it. *Williamson v. Allinson*, 2 East, 446; *Maxwell v. Maxwell*, 31 Me. 184.

Where a driver stops a car at a place where passengers are in the habit of getting off, he must not start it again until he knows he can do so in safety to his passengers. People may get off when and where they please, provided the car is stopped when they attempt to do so. *Railway Co. v. Mills*, 105 Ill. 67; *Railway Co. v. Mumford*, 97 id. 567; *Railroad Co. v. Cook*, 145 id. 551; *Ward v. Railway Co.* 165 id. 462; *Railroad Co. v. Arnol*, 144 id. 261.

A contract is implied, where one takes passage with a common carrier, that he shall pay a reasonable price or reward for being carried, and that the carrier shall exercise due care, skill and diligence in transporting him safely and speedily to the journey's end, and it is not necessary to prove an express contract or actual payment of the reward. Angell on Com. Carriers, secs. 124, 461, 467; *McGill v. Rowland*, 3 Barr, 451; *Frink v. Schroyer*, 18 Ill. 419.



Mr. JUSTICE BOGGS delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the circuit court of Cook county entered in favor of the appellee in the sum of \$3500, in an action on the case brought by appellee, against the appellant company, to recover for injuries alleged to have been sustained by the appellee while a passenger on one of the appellant's trains of street cars, through the negligence of the servants of the company in charge of the train, as was alleged.

It is urged by the appellant company there is a total absence of evidence to show that appellee was a passenger, and in the same connection it is insisted the jury disregarded the instructions given by the court, which expressly directed them that the allegation in the declaration the appellee was a passenger must be supported by proof that she was a passenger and had paid her fare. We find no proof in the record upon the question whether the conductor had collected fare from the appellee, nor do we think it is necessary such payment should have been affirmatively proven. In *North Chicago Street Railroad Co. v. Williams*, 140 Ill. 275, we said (p. 288): "It is not necessary that there be an express contract in order to constitute the relation of carrier and passenger, nor that there should be a consummated contract. The contract may be implied from slight circumstances, and it need not be actually consummated by the payment of fare. \* \* \* The whole matter seems to depend largely upon the intention of the person at the time he enters the car." In the same case the court cited with approval a quotation from the opinion in the case of *Butler v. Glen Falls and C. Railroad Co.* 121 N. Y. 112, as follows: "It does not seem reasonable to assume, as a matter of law, that a person who in an orderly way attempts to enter a street car as a passenger is to be regarded as a trespasser until a special contract has been made with the conductor, based upon the payment of the required fare." The rule

is declared in Hutchinson on Carriers (sec. 565) to be: "It is universally agreed that the payment of the fare or price of the carriage is not necessary to give rise to the liability. The carrier may demand its payment, if he chooses to do so, but if he permits the passenger to take his seat or to enter his vehicle as a passenger without such requirement, the obligation to pay will stand for the actual payment, for the purpose of giving effect to the contract, with all its obligations and duties. Taking his place in the carrier's conveyance with the intention of being carried creates an implied agreement upon the part of the passenger to pay when called upon, and puts him under a liability to the carrier, from which at once spring the reciprocal duty and responsibility of the carrier."

The proof is ample that appellee entered the car in an open, orderly manner, conducted herself as a passenger and was conveyed as such, together with other passengers, from the place where she boarded the car to the place where she was injured in attempting to alight from it. In the absence of any testimony tending to question her standing as a passenger, the inference she bore that relation to the company inevitably arose. Express affirmative proof of the payment of fare was not essential to warrant the jury in regarding her as a passenger. Aside from this, in the statement of the case in the brief of appellant filed in this court, counsel for appellant say: "Plaintiff became a passenger on one of defendant's trains of street cars at Bishop court, on Madison street, to be carried into the city." The instruction of the court that appellee could not recover unless it expressly appeared in proof she had paid her fare was erroneous, and therefore the refusal of the jury to accept and be controlled by it does not constitute error reversible in character. *McNulta v. Ensch*, 134 Ill. 46.

It is next urged the court erred in refusing to arrest the judgment. The reason urged in support of the motion is, the declaration failed to set forth a cause of action.

The *gravamen* of the charge in both of the counts of the declaration is, the car was stopped at the corner of Washington street and Fifth avenue; that appellee attempted, with due care and caution, to alight, and that the employees of the defendant company in charge of the train of cars negligently and without warning caused the car to be suddenly and violently started, and thereby the plaintiff was thrown with great force and violence from the car and greatly bruised and wounded, etc. The supposed deficiency in the declaration is the omission of an averment that the place where the car was stopped was a regular place of stopping for the purpose of enabling passengers to leave the car, or that appellee notified the employees of the appellant in charge of the car, by signal or otherwise, of her desire or intention to alight there. The declaration charged that the car stopped at a street crossing, and that it then became the duty of the appellant company to give the appellee an opportunity of safely alighting; that it did not regard such duty, but negligently and carelessly put the car in motion while appellee, with due care, was endeavoring to leave the car. The appellant company did not see fit to challenge, by a demurrer, the legal sufficiency of the averments, but filed the general issue, thus denying the truth of the allegations, and therefore could not be allowed to complain, after a hearing before the jury, that the allegation that the duty arose to see that passengers were not in dangerous positions before moving the car was but a mere conclusion of the pleader, and therefore such a fault as demanded the court should refuse to enter judgment. Moreover, we incline to the view that whenever a street car is stopped at or near a crossing of streets, before the car is again put in motion the duty is cast upon those in charge of the car of exercising proper and reasonable care for the safety of passengers. It is within common knowledge and observation that passengers enter and alight from street cars at or near the crossings of streets, and

that street cars stop at street intersections for the purpose of receiving and discharging passengers. If a car is brought to a stop at or near such crossings, it is not unreasonable to charge the conductor and grip-man in control of the car with notice that passengers may avail themselves of the opportunity thus presented for leaving the car, and also with the duty of exercising a reasonable degree of care, before putting the car again in motion, to see that passengers seeking ingress into or egress from the car are not in such positions as to be endangered by putting the car again in motion.

In the case at bar an ordinance of the city of Chicago was introduced, as follows:

"Cars stopping at a street intersection shall stop at the further walk thereof, so that the cars shall not, when stopped, interfere with the travel on cross-streets; and, subject to the foregoing provision of this section, and excepting on bridges, all street cars shall stop to receive and to let off passengers wherever they are desired to do so, excepting between the hours of six o'clock and eight o'clock A. M. and five o'clock and seven o'clock P. M., during which hours they may regulate their stopping by the first provision of this section. Each team of horses hitched to a street car shall have a bell or bells attached to them."

It appears that the car in this instance stopped at or just before reaching the nearest walk of the street intersection, and the contention of the appellant company is, the appellee should have remained in her seat until the car had crossed the intersection of the street and stopped at the further walk, where it was required to stop by the provisions of the ordinance. The purpose of the requirement of the ordinance is expressly stated in it to be to avoid interference with travel on cross-streets, which would occur if the cars were stopped at the nearest walk, the body of the car or train extending into and obstructing the cross-street. The means of ingress to or egress

from a car, so far as the safety of the passengers is concerned, are not different at the different walks. The company makes no provision at either of the walks for the safety or convenience of persons desiring to enter or leave its cars. At either place passengers step from the car to the surface of the street. Even under the ordinance both walks are stopping places, depending upon the direction in which the car is moving. If a car approaching a street crossing comes to a stop at the nearest walk, passengers who have reached their destination may not unreasonably regard it as an invitation to alight, and other persons desiring to become passengers may, without any necessary imputation of negligence, endeavor to enter the car. Conductors, car-drivers, or others in charge of the movement of the car or train, after having brought the car to a stop cannot be permitted, because of the ordinance, to ignore the fact that passengers, or those desiring to become such, may be imperiled by putting the car again in motion without notice or warning. It is the duty of such persons so controlling a car to exercise reasonable precaution to avoid injuring those who may, under such circumstances, be endeavoring to alight from or enter the car, and the adoption of the ordinance had no effect to relieve such employees of the appellant company from their obligation and duty in this regard.

It is urged the court erred in refusing the motion made by the appellant, at the close of all the testimony, to exclude the evidence and instruct the jury to return a verdict for the appellant company. The first ground urged in support of the motion is, no proof was introduced to support the allegation that the car stopped at the corner of Washington street and Fifth avenue. It is not contended there was no evidence the car was brought to a stop, but the insistence is the proof upon the point showed the car was stopped before it reached the intersection of those streets, and though near the corner was

not precisely at it when it stopped. Nothing need be said upon this point further than we find the evidence tended to sustain the substance of the allegation.

The remaining grounds urged in support of the motion are, there was no proof that the car, after being stopped, was suddenly and violently started, as charged in the declaration, and that it did not appear the appellee exercised ordinary care for her own safety. The testimony of Mrs. Moore, a witness for the appellee, and of appellee herself, if accepted by the jury, as it seems to have been, warranted the finding the car, after being stopped, was suddenly put in rapid motion. This was a contested question of fact, but the evidence in support of the position of the appellee was such as to demand the submission of the question to the jury, and the verdict of the jury and the judgment of the Appellate Court are conclusive as to the fact. Whether the appellee exercised ordinary care and prudence on the occasion in question was a question of fact to be determined by the jury under proper instructions of the court.

It is complained the court in this connection refused to give the following instruction:

26. "The jury are instructed that ordinary care and prudence is the exercise of that care which every person of common prudence bestows upon her affairs and concerns, and a person about to make a movement or to take an action which, under all the surroundings and circumstances, would appear to an ordinarily prudent and careful person exercising due care for her own safety to be attended with risk and danger to her person, must exercise the highest degree of vigilance and care for her own safety; and if the jury believe, from the evidence, that the circumstances in this case required from the plaintiff the exercise of that care, and that by its exercise the injuries complained of in this case might have been avoided, the jury should find the defendant not guilty."

The instruction should not have been given. Ordinary—not the highest—degree of vigilance and care is all that is required. What is ordinary care depends upon the circumstances of the particular instance. When the circumstances are such that an ordinarily careful and prudent person would deem it essential to exercise a greater degree of care and caution than upon less threatening circumstances, such greater degree of care would be but ordinary care. The test always is, not that the highest possible care and caution shall be exercised, but such degree of care, only, as an ordinarily careful and prudent person would exercise in like situation. The law upon this feature of the case was clearly and fully stated to the jury in instructions given for the appellant, numbered 7, 10, 11, 19 and 20, and the single instruction given for the appellee was properly qualified and restricted so the jury should fully understand appellee's right of recovery should be made to depend upon whether she had exercised due and ordinary care.

The court granted eighteen instructions as asked by the appellant company, modified one and refused six. The instruction which was modified related to the requirement of law that the appellee should use ordinary care, and was as follows:

20. "[The court instructs the jury that] in determining the question whether the plaintiff was negligent in and about alighting from the street car in question under the circumstances under which the jury find, from the evidence, the plaintiff did so, they are to take into consideration not alone the age and condition of the plaintiff at the time, but also the relative danger and risks attending the act of alighting from a car propelled by cable, as the one in question was, and the character and condition of the locality and the plaintiff's prior knowledge of its character and condition, *as shown by the evidence*; and they are instructed that the plaintiff was required to

exercise care for her safety in proportion to the dangers and risks attending the act of alighting from a cable car under such circumstances, and a failure on her part to exercise this care is negligence which deprives her of the right of recovery in this action; and if the jury believe, from the evidence in this case, that the plaintiff did not exercise such care, and was guilty of such negligence, and that such failure to use such care and such negligence contributed in any way to the injury complained of in this action, then the jury should find the defendant not guilty."

The modification was effected by striking out the words within the brackets and adding the words in italics. No complaint is made in the brief of the modification, and clearly there is no room for any such complaint. The instruction as modified stated the law upon the point in all respects as favorably as possible for the appellant company, and removed all grounds of complaint of the rulings of the court upon the point.

The court refused instruction No. 22, asked by the appellant. This instruction asked the court to advise the jury that passengers on the cars of the appellant company are presumed to know the proper places for passengers to alight are at the further crossings of street intersections, and that the servants of the appellant company in charge of the cars have a right to assume that persons intending to alight will exercise for their own safety reasonable and ordinary care with reference to such knowledge, and the circumstances attending the operations of the cars at the time, etc. We are aware of no presumption of law that passengers know the proper places to alight from street cars are at the further crossings of street intersections. If such a presumption exists, it is one of fact for the jury to determine,—not to be declared by the court as matter of law. Moreover, the instruction omitted all reference to the fact the car in question was stopped at the nearest street walk of the



crossing, and ignored the fact that passengers might well assume such stopping was to enable them to leave the car at such nearest walk.

Complaint is made that the court gave the following instruction asked on behalf of the appellee:

"The court instructs the jury, as a matter of law, that it was the duty of the defendant, as a common carrier of persons of Chicago, when it stopped its cars, whether in consequence of a signal from some passenger on the car or not, not to start the same again while its passengers, or any of them, were in the act of getting off the car, if the fact that its passengers, or any of them, were in the act of alighting was known to the person having charge of said car, or would be known to such person by the exercise of due care and caution in the discharge of his duties; and as a common carrier of passengers the defendant should give its passengers a reasonable opportunity to alight from its cars when standing still, before starting the same, if the fact that its passengers, or any of them, desire to alight is known, or by the exercise of due care and diligence would be known, to the person in charge of the car. And if the jury believe, from the evidence in this case, that on the twenty-second day of September, 1893, the plaintiff was a passenger upon one of the street cars of the defendant, operated by it on Washington street and Fifth avenue, in said city of Chicago, and that while such car of the defendant in which the plaintiff and others were being conveyed as passengers was driven along Washington street, west of and towards Fifth avenue, it was stopped for the purpose of allowing its passengers, or some of them, among whom was the plaintiff, to get off, or had stopped for any other purpose, with or without a signal to stop, and when so stopped its passengers, or some of them, were in the act of getting off said car, and that the grip-man or other person in charge of said car for the defendant knew, or by the exercise of due care and caution in the discharge of his

duties would have known, that said passengers were in the act of getting off said car, and if you further find, from the evidence, that the plaintiff at this time and place, the said car being stopped and not in motion, (if you find, from the evidence, that such was the fact,) in the exercise of due care and diligence on her part was also in the act of alighting from said car, and that the defendant, by its grip-man, started the said car while the plaintiff was so getting off and before she had a reasonable time to do so, and thereby threw the plaintiff down upon the street, and by reason thereof the plaintiff was greatly injured in and about her hips, and was thereby otherwise greatly bruised and suffered severe bodily pain and injury, without negligence or fault on her part and by reason of negligence or carelessness on the part of the defendant's servants in charge of said car, (if you find, from the evidence, that such servants of the defendant were guilty of carelessness or negligence in starting said car,) then the defendant would be liable for the damages, if any, thereby sustained by the plaintiff, and the jury should find the issues herein for the plaintiff, and assess her damages at such sum as the jury shall find, from the evidence, she has thereby sustained."

A number of objections are urged to this instruction, but what has been said hereinbefore disposes of such objections in the main. It is vigorously protested the effect of this instruction is to declare that if a street car is stopped at any place, for any purpose, the passengers may proceed to alight, and that the conductor in charge of the train or car, and the car-driver, must, before starting the car, exercise care and diligence to see that no one is or will be endangered by putting the car again in motion. Without assuming to declare whether the instruction should be sustained if susceptible of the construction sought to be put upon it by counsel for the appellant company, we may dismiss the subject by the remark it is plainly not susceptible of such construction.

In its first part the declaration of the instruction, in substance, is the statement of a principle of law in the abstract, and the remainder of the instruction is devoted to an application of that principle. In declaring the principle in the abstract and in applying it to the case in hand, the duty declared to devolve upon the employees of the company in charge of the car to give its passengers a reasonable opportunity to alight after the car had been stopped, from whatever cause, and not to start the car while any of the passengers were in the act of getting off, only arose if the fact that the passengers, or some of them, were in the act of leaving the car was known to the persons so in charge of the movement of the cars, or would have been known by the exercise of due care and caution in the discharge of their duties in the respective capacities in which they were serving the company in the control and management of the car or train of cars. Whether a street car is stopped at a place for discharging passengers and for the purpose of discharging them, or at some other place and for a different purpose, if stopped at all, the rule with relation to the duty of those controlling the car with reference to the safety of passengers whom the persons in charge of the car or train know are endeavoring to alight from the car is the same. Reasonable and ordinary care must be observed to avoid injuring them, and no reason is perceived why the same degree of care and diligence should not be required if the circumstances are such that in the discharge of the duties of their respective positions such persons so in charge of the cars would, in the exercise of ordinary care for the safety of passengers, have known that passengers were endeavoring to alight from the cars. This instruction is unnecessarily verbose, and for that reason in a degree is lacking in clearness, but is free from error reversible in character.

We find no error in the record, and the judgment is affirmed.

*Judgment affirmed.*

FITZ E. CULVER

v.

FREDERICK M. ATWOOD *et al.**Opinion filed December 22, 1897.*

**MECHANICS' LIENS**—*act of 1895 cannot apply to prior contracts.* The Mechanic's Lien act of 1895 gives new remedies to parties furnishing labor or material to sub-contractors, and imposes new duties upon owners, and cannot be allowed to control contracts entered into before its passage without making it obnoxious to the constitutional provision concerning laws impairing the obligation of contracts. (*Andrews & Johnson Co. v. Atwood*, 167 Ill. 249, followed.)

*Culver v. Atwood*, 67 Ill. App. 303, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

ARND & ARND, for appellant.

MARSTON, AUGUR & TUTTLE, for appellees.

MR. JUSTICE MAGRUDER delivered the opinion of the court:

This is a proceeding brought, under the Mechanic's Lien law of 1895, to enforce a mechanic's lien in favor of a sub-sub-contractor and material-man, who furnished material to sub-contractors. The act of 1895 was passed June 26, 1895, and went into force on the same day. On May 27, 1895, Frederick M. Atwood, one of the appellees, being the lessee under a lease for a long term of years of a lot in Chicago, made a contract with the George A. Fuller Company, by which the latter agreed to erect a building on said lot for Atwood for the sum of \$238,000.00. On June 10, 1895, the George A. Fuller Company made a written contract with the Charles H. Simmons Company, by which the latter agreed to furnish steam-heating and boilers for said building. It will be noticed, that the two

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| 170 | 432 |
| 199 | 801 |

contracts thus made, one between the owner and contractor, and the other between the contractor and sub-contractor, were entered into before the act of 1895 went into force. Subsequently, and after the law had gone into force, to-wit: on September 22, 1895, the Charles H. Simmons Company applied to the appellant, Culver, a manufacturer of and dealer in grate-bars, to furnish grate-bars for the boilers in said building, which grate-bars were so furnished by October 28, 1895. Shortly before that time, to-wit: on July 22, 1895, the Charles H. Simmons Company made a contract with the Andrews & Johnson Company for the ventilation and shafting required under its contract.

The Andrews & Johnson Company also filed a petition to enforce a claimed lien as sub-sub-contractors, and their suit was consolidated in the court below with the suit of the present appellant, Culver. The suit of the Andrews & Johnson Company against the present appellees was disposed of by this court in the recent case of *Andrews & Johnson Co. v. Atwood*, 167 Ill. 249. The facts and record in that case were the same as the facts and record in the present case, except that Culver furnished grate-bars for the boilers, and the Andrews & Johnson Company furnished the ventilation and shafting.

In *Andrews & Johnson Co. v. Atwood*, *supra*, it was held that the Mechanic's Lien law of 1895 gives new remedies to sub-sub-contractors, and imposes new obligations and duties upon owners, and affects their property rights; and that, therefore, it cannot be applied to contracts entered into before its passage, inasmuch as such application would make it obnoxious to the provisions of the constitution against impairing the obligations of contracts. The same question thus decided there is involved here, and the decision there must govern the decision of the present controversy. Appellant is not entitled to a lien.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

JOHN B. MALLERS

v.

THE WHITTIER MACHINE COMPANY.

*Opinion filed December 22, 1897.*

1. APPEALS AND ERRORS—*evidence in suit at law can be preserved only by bill of exceptions.* In a case at law the evidence introduced can be preserved for the inspection of a court of review only by bill of exceptions signed and sealed by the judge.

2. BILLS OF EXCEPTION—*determination of what shall go in bill of exceptions is a judicial act.* The determination of what shall be incorporated in a bill of exceptions is a judicial act calling for the exercise of judicial power, and it cannot be delegated by the judge nor be performed by the parties by stipulation.

3. SAME—*stipulation of counsel does not preserve evidence for review.* A certified copy, in the transcript of record, of a stipulation of counsel which purports to set forth the evidence introduced at the trial, and which was filed more than two months after the signing and filing of the bill of exceptions which did not contain nor purport to contain all the evidence, does not preserve for review, on appeal, the evidence therein set forth.

4. SAME—*action of trial court is presumed to be sustained by evidence.* In the absence of a bill of exceptions signed and sealed by the judge, showing the evidence introduced at the trial, it will be presumed, on appeal, that the action of the trial court was justified by the state of the proof.

*Mallers v. Whittier Machine Co.* 70 Ill. App. 17, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JAMES GOGGIN, Judge, presiding.

CHARLES B. STAFFORD, for appellant.

HAWLEY & PROUTY, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The action below was assumpsit by the appellee company, against the appellant, to recover upon two promissory notes. To the declaration the appellant filed a

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single plea, viz., a plea in abatement that a former suit was pending in the Circuit Court of the United States for the Northern District of Illinois between the same parties and upon the same cause of action. The plea was traversed and issue joined. The cause was submitted to a jury, and under peremptory instructions from the court a verdict was returned for the appellee company. Judgment being rendered thereon, appellant appealed to the Appellate Court, where the judgment of the Superior Court was affirmed. This is an appeal from the judgment of the Appellate Court.

The only question of law sought to be presented by the record is whether the court erred in directing the jury to return a verdict for the appellee. It was clearly competent and proper to so direct the jury in the absence of evidence tending to support the ground of defense; consequently, to determine as to the propriety of the action of the court in giving the instruction, it is essential we should consider the testimony produced before the jury, and ascertain whether it tended to support the case for the appellant. But the bill of exceptions does not contain, or purport to contain, any of the evidence produced before the jury. We find in the transcript of the clerk a certified copy of a stipulation signed by counsel for the parties, and filed with the clerk some two months after the bill of exceptions was signed and filed, which purports to set forth the evidence introduced at the trial, and it is urged this stipulation brings before us for review the evidence purported to be therein set forth. In this we conceive counsel for appellant is in error. The determination of what shall be incorporated in a bill of exceptions is a judicial act, to be determined by the exercise of judicial power, (*Emerson v. Clark*, 2 Scam. 489, *Culliner v. Nash*, 76 id. 515, *People v. Anthony*, 129 id. 218,) and it cannot be delegated by the judge to the clerk (*Emerson v. Clark*, *supra*,) or to the reporter, (*Culliner v. Nash*, *supra*,) or certified to by the clerk (*Mar-*

*tin v. Foulke*, 114 Ill. 206, *Wright v. Griffey*, 146 id. 394, *Tarble v. People*, 111 id. 120,) or stipulated by the parties. (*Harding v. Brophy*, 133 Ill. 39.) In a case at law the evidence introduced can only be preserved for the inspection of a court of review by a bill of exceptions signed and sealed by the judge. (*Wright v. Griffey, supra.*) In the absence of a bill of exceptions signed and sealed by the judge, showing the evidence introduced, the presumption is the action of the trial court was justified by the state of the proof. *Kern v. Strasberger*, 71 Ill. 303; *Schmidt v. Braley*, 112 id. 48; *Troy Laundry Machinery Co. v. Kelling*, 157 id. 495.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## HENRY J. HEWES

v.

JACOB GLOS *et al.*

*Opinion filed December 22, 1897.*

1. EVIDENCE—*bill to set aside a judgment of sale—complainant must prove controverted allegation of ownership.* An allegation of ownership by complainant is essential to a bill to set aside a judgment of sale for delinquent taxes and certificates of sale thereunder, and, when denied by the defendant, must be proved by the complainant.

2. SAME—*mere production of deed is not alone sufficient to prove ownership.* The mere production of a warranty deed to the complainant, without proof of possession by the grantor or possession or acts of ownership by the complainant, is not sufficient to support the complainant's allegation of ownership which is denied by defendant.

3. IMPROVEMENTS—*whether an improvement is local in character is a question of fact.* Whether or not an improvement proposed to be constructed by a municipal corporation is local in its character, so that it can be made by special assessment, is a question of fact.

4. SAME—*decision of corporate authorities as to character of improvement is subject to review.* The decision of corporate authorities as to the character of an improvement is subject to review by the courts, and such authorities cannot arbitrarily determine that an improvement shall be treated as local which is general in its character.

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| 110a | 125  |
| 170  | 436  |
| e218 | 23   |
| 218  | 24   |
| d218 | 273  |



5. SAME—*laying water mains in particular street is a local improvement.* The laying of water mains for the distribution of water along a particular street, for the use of residents thereon, is a local improvement, which may be paid for by special assessment.

6. SAME—*the construction of a general system of water-works is not a local improvement.* The construction of a general system of water-works, for fire protection and general use, is not a local improvement which may be paid for by special assessment.

7. MUNICIPAL CORPORATIONS—*determination of council as to character of improvement may be questioned in direct proceeding.* The determination of a city council that a general system of water-works is a local improvement is erroneous, and the passage of an ordinance in accordance therewith is an improper exercise of corporate power, which may be questioned in a direct proceeding.

8. SAME—*ordinance providing for general improvement by special assessment not void.* An ordinance which provides for the construction of a general improvement by special assessment is not void, so as to deprive the court of jurisdiction to confirm the assessment, and such judgment of confirmation cannot be attacked in a proceeding to set aside the judgment of sale for the delinquent assessment.

*Glos v. Hewes*, 69 Ill. App. 75, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANEY, Judge, presiding.

MASTERTON, FOWLER & HAFT, for appellant.

ENOCH J. PRICE, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Henry J. Hewes, the appellant, filed his bill in the circuit court of Cook county, against Jacob Glos, Philip Knopf, county clerk, and D. H. Kochersperger, county treasurer of Cook county, the appellees, together with other defendants, asking to have certain assessment proceedings and judgment for the sale of his property, and sales and certificates thereof, set aside and declared null and void, and to enjoin said county clerk from issuing deeds to the purchasers and the defendants from taking

any further proceedings under the same. The defendants except appellees were defaulted, but appellees answered the bill, and on a hearing the court granted the relief prayed for. Appellees appealed to the Appellate Court, where the decree of the circuit court was reversed and the bill was dismissed at the cost of appellant, and he appealed to this court.

In his bill complainant averred that he was the owner of certain lots in the village of Winnetka; that on March 1, 1892, the village board passed an ordinance for the construction, by special assessment, of a system of water-works for fire protection and for domestic use by the inhabitants, and other purposes, with a system of distribution pipes; that his property was assessed for the improvement, but not in his name; that he had no notice of the proceedings for confirmation or judgment for sale until on or about September 1, 1893; that his property was not contiguous to nor benefited by the improvement, and that his lots were sold October 31, 1895, under the judgment of the county court, to the defendant Jacob Glos and other defendants named.

The only evidence produced at the hearing was on the part of complainant. It consisted of a warranty deed to him of forty-five acres of land covering the location of the lots, the special assessment proceedings in the county court, in which the lots in question were assessed in the names of B. A. Ulrich & Co., and evidence that notices were sent by mail to all parties whose names appeared on the assessment roll, but not to complainant, who first heard of the proceedings in August, 1893. Complainant admitted at the hearing that the defendant Glos paid for the certificates of purchase, to the county treasurer, at the sale, the sum of \$503, in accordance with his bids.

The averment of the complainant that he was the owner of the lots was essential to the maintenance of his bill, and it was denied by the defendant Glos. It was necessary for complainant to prove it. (*West v. Schnebly*,

54 Ill. 523; *Hopkins v. Granger*, 52 id. 504; *Emery v. Cochran*, 82 id. 65; *Hutchinson v. Howe*, 100 id. 11; *Langlois v. Stewart*, 156 id. 609.) The only evidence offered to sustain the averment was the warranty deed, without proof of possession by the grantor or of possession or acts of ownership under it by complainant. Possession under a claim of ownership, or a deed from a grantor in possession, may be sufficient *prima facie* evidence of ownership, but the mere production of a deed from one who is not shown to have had any possessory or other title is not sufficient. Reliance is placed upon the case of *Gage v. Parker*, 103 Ill. 528, as holding that a deed alone is sufficient; but in that case there was testimony by complainant of the purchase of the property, and it does not go to the extent of holding that a deed alone will support the averment.

The special assessment proceedings offered in evidence by the complainant were in all respects regular and sufficient. Notices were posted and published as required by the statute, and it is not claimed that there was any defect in them or any fraud against complainant. The only ground of relief alleged in the bill which it is claimed supports the decree of the circuit court arises out of the ordinance itself. The claim made is, that the ordinance was void and could not give the county court jurisdiction to make and confirm the assessment, and that therefore the judgment of confirmation, and the subsequent judgment for sale on the application of the county treasurer, were void.

That the village of Winnetka had power to levy special assessments for local improvements is, of course, conceded. When it is proposed by a municipal corporation to make an improvement, the question whether it is local in its character, so that it can be made by special assessment, is a question of fact, and not of law. (*Wilson v. Board of Trustees*, 133 Ill. 443.) The decision of the corporate authorities upon that question is subject to review by the court, and they cannot arbitrarily determine that

the improvement shall be treated as local when it is in fact general in its character. (*City of Bloomington v. Chicago and Alton Railroad Co.* 134 Ill. 451.) In this case, the village had power to provide for a system of water-works for fire protection and for the use of the inhabitants of the village, and the laying of water main pipes for the distribution of water along particular streets, for the use of the inhabitants, was a local improvement for which a special assessment could be levied. (Hurd's Stat. p. 310; *Hughes v. City of Moline*, 163 Ill. 535.) But in reviewing cases where corporate authorities have attempted to construct a general water-works system for fire protection and general uses by special assessment, we have held that such improvement is not local in its character, and that an assessment for such a purpose should not be confirmed by the court. (*Village of Morgan Park v. Wiswall*, 155 Ill. 262; *Village of Blue Island v. Eames*, id. 398; *Hughes v. City of Moline*, 164 id. 16.) A determination by the corporate authorities that such an improvement is local in its character is erroneous, and the passage of such an ordinance is an improper exercise of the corporate power, which may be challenged by the property owner.

But while the decision of corporate authorities is subject to review, it cannot be said that the ordinance is absolutely void, so that no rights can grow up under it and that the court cannot obtain jurisdiction by a petition filed in pursuance of it. It has not been held that such an ordinance as this is absolutely void in its character, so that a judgment of confirmation can be attacked collaterally, and all the cases have been where the question was raised by direct proceeding on a review of the judgment. The term "void" has been used indiscriminately in some cases as applied to ordinances which are nullities and those which may be avoided as an unreasonable or improper exercise of authority. An ordinance may be unreasonable in its provisions although dealing with a subject concerning which the municipal authori-

ties have power to legislate, and such ordinances have been termed void; but that is so only in the sense that their unreasonable character is a good defense against their enforcement. The statute furnishes no definition of a local improvement; and the determination of that question in a particular instance is left, in the first place, to the corporate authorities, but they must act reasonably and without fraud, or their action will be invalid. (*Louisville and Nashville Railroad Co. v. City of East St. Louis*, 134 Ill. 656.) An arbitrary determination of the question contrary to the fact was accordingly annulled in *City of Bloomington v. Chicago and Alton Railroad Co. supra*, and *City of Chicago v. Law*, 144 Ill. 569. When the question came up as to this particular kind of improvement for the first time in *Village of Morgan Park v. Wiswall, supra*, the question discussed and decided was not whether the ordinance was a nullity, but whether the determination of the village board was subject to review, and it was held that it was. The action of the county court in reviewing that determination and refusing to enter judgment was affirmed. It was therefore within the province of the county court to determine whether the water-works system was a local improvement or not, and if it erred in that particular it was error only to be corrected by appeal or writ of error.

The judgment of confirmation was in October, 1892, and the complainant knew of it in August, 1893. He did nothing in the matter until after the sale, which took place more than two years afterward, October 31, 1895, and the bill in this case was filed January 8, 1896. The county court had jurisdiction, and if its judgment of confirmation was erroneous it might have been reversed on a writ of error, but it is not subject to attack in the manner attempted in this case. The conclusion of the Appellate Court on that subject was right. It is objected, however, that the Appellate Court dismissed the bill absolutely as to all parties, although other defendants than appellees had been defaulted and a decree had

been taken against them to which they made no objection. Doubtless that fact was not noticed or brought to the attention of the Appellate Court, but as to the defendants who had defaulted and did not appeal the decree should have been permitted to stand.

The judgment of the Appellate Court will be modified so as to dismiss the bill at the cost of complainant, the appellant in this court, as against the defendants who appealed and are appellees in this court, and as so modified the judgment is affirmed.

*Judgment modified.*

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HARDIN COX

v.

FERDINAND STERN.

*Opinion filed December 22, 1897.*

1. MORTGAGES—*statute does not prescribe form for affidavit extending lien of chattel mortgage.* Section 4 of the Mortgage act, as amended in 1891, (Laws of 1891, p. 172,) which provides for the extension of the lien of a chattel mortgage by an affidavit reciting certain facts, does not prescribe the manner of authenticating the affidavit.

2. AFFIDAVITS—*affidavit defined.* An affidavit is a written declaration on oath, sworn to by the person making it, before some officer duly authorized by law to administer oaths.

3. SAME—*venue—when ascertained by an inspection of seal attached by notary.* Where the venue of an affidavit extending a chattel mortgage lien imperfectly states the venue as being "State of Illinois, county of Illinois," the true venue may be ascertained by reference to the seal attached by the notary administering the oath, which shows the county within which he is authorized to act.

4. SAME—*notary is presumed to have administered oath where authorized to act.* In determining the venue of an affidavit by inspection of the seal attached by the notary, it will be presumed that the notary administered the oath in the county within which he was duly authorized to act.

5. SAME—*inscription on notary's seal attached to affidavit is presumed to be true.* In determining the venue of an affidavit by reference to the notary's seal attached thereto, it will be presumed that the inscription upon his seal, descriptive of his office and showing the name of the place or county where he resides, is true.

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6. SAME—*effect where recorder fails to copy inscription on notary's seal.* Where the venue of an affidavit can be ascertained only by an inspection of the notary's seal attached thereto, the fact that the recorder does not copy the inscription but merely makes a scrawl, writing in the word "seal," does not vitiate the affidavit, as the recorder should copy the inscription.

7. SAME—*affidavit filed in county where made is good without a seal.* An affidavit filed for record in the county where made is good without the seal of the notary administering the oath, as the court will take judicial notice of the notaries public of its county.

8. SAME—*certificate of officer is not a necessary part of affidavit.* The *jurat*, or certificate of the officer administering the oath, is not a necessary part of the affidavit, and it may be shown *aliunde* that the statements in the affidavit were in fact made as they purport to be,—on oath duly administered by an authorized officer.

CARTWRIGHT and WILKIN, JJ., dissenting.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

J. A. BELLATTI, for appellant.

EDWARD P. KIRBY, and WILLIAMS, LINDEN, DEMPSEY & GOTT, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This was a suit in replevin, by appellee, for household furniture, carriage, horses, etc., taken by appellant, as sheriff of Morgan county, under four executions issued on judgments against Bessie and Henry Schoenfield. Appellee claims under a chattel mortgage executed by the Schoenfields to him, which mortgage was sought to be extended, under the statute, by filing an affidavit for record in the recorder's office of Morgan county. The circuit court gave judgment for appellee that he have the property, and for costs. Appellant appealed to the Appellate Court, where the judgment was affirmed, and he has further appealed to this court.

The only point discussed by appellant before the Appellate Court, and the only one made in this court, is, that the alleged affidavit was insufficient to extend the mortgage; that it really was no affidavit, and that it was error to admit the same in evidence, and error also to admit parol evidence to aid and supplement the said affidavit.

The venue and commencement of the affidavit are as follows:

"STATE OF ILLINOIS, }  
County of Illinois. } ss.

"We, Henry L. Williams, attorney for Ferdinand Stern, of Cook county, State of Illinois, and Henry Schoenfield and Bessie Schoenfield, of Morgan county, State of Illinois, being duly sworn, each for himself and herself, says that," etc.

The conclusion and certificates are as follows:

"And affiants make this affidavit for the purpose of extending the time of payment of said debt, and the lien of said chattel mortgage on the property therein mentioned, according to the statute in such case made and provided. Such chattel mortgage is hereby extended by agreement of Henry Schoenfield and Bessie Schoenfield, mortgagors, and Henry L. Williams, attorney for the said Ferdinand Stern, mortgagee, to the twenty-third day of March, A. D. 1897.

HENRY L. WILLIAMS,  
Att'y for Ferdinand Stern, mortgagee.  
BESSIE SCHOENFIELD,  
HENRY SCHOENFIELD.

"Subscribed and sworn to by the said Henry L. Williams before me this 25th day of March, A. D. 1895.

CHARLES E. ANTHONY,  
Notary Public.

[Notarial Seal.]

"Subscribed and sworn to by said Henry Schoenfield and Bessie Schoenfield before me this . . . day of March, 1895."

The notarial seal was inscribed: "Charles E. Anthony, Notary Public, Cook county, Illinois." On the back of the affidavit was a duly executed certificate of acknowledgment of the justice of the peace in Morgan county that the Schoenfields appeared before him and acknowledged that they signed said affidavit; but, of course, such an acknowledgment cannot take the place of the required oath.



Objections are made that the instrument in question is not an affidavit, but only a statement; that after admitting the parol evidence it is, at most, only a sworn statement; that it has no venue, and that there is no signature or date to the *jurat* referring to the Schoenfields; that the statute requires an affidavit in order to extend a chattel mortgage; that the affidavit must be perfect and complete, and must so appear of record, to be valid against creditors, and that parol evidence is inadmissible to aid or sustain the same.

The statute allowing the lien of a chattel mortgage to be extended requires the filing for record of an affidavit setting forth particularly certain facts enumerated in the statute. (See Rev. Stat. chap. 95, sec. 4, as amended in 1891.) It nowhere directs or specifies anything in regard to the formal parts or authentication of the affidavit. Bouvier's Law Dictionary defines an affidavit to be "a statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath." And in 1 Encyclopedia of Pleading and Practice (309) it is said: "An affidavit is a voluntary *ex parte* statement, formally reduced to writing and sworn to or affirmed before some officer authorized by law to take it." This court said in *Harris v. Lester*, 80 Ill. 307: "An affidavit is simply a declaration on oath, in writing, sworn to by a party before some person who has authority under the law to administer oaths."

As to the venue, we held in *Hertig v. People*, 159 Ill. 237, that a notary public "being a public officer, it will be presumed he administered the oath in the county within which he was authorized to administer oaths, for the presumption is that he has done his duty." The venue of this instrument is: "State of Illinois, County of Illinois,—*ss.*" As there is no such county in this State, we must look at the seal of the notary to ascertain for which county he was authorized to administer oaths. The seal bears the following inscription: "Charles E. Anthony, Notary Pub-

lic, Cook County, Illinois." The statute (chap. 99, sec. 7,) provides that "each notary public shall \* \* \* provide himself with a proper official seal, \* \* \* upon which shall be engraved words descriptive of his office, and the name of the place or county in which he resides." It will be presumed that the notary has complied with the statute, and that the inscription on his seal speaks the truth. We think the venue sufficiently appears. Indeed, if the instrument had been filed in Cook county it would have been good without a seal, as the courts will take judicial notice of the notaries in their county. *Schaefer v. Kienzel*, 123 Ill. 430.

Appellant insists that the inscriptions on notaries' seals never appear of record, but that the recorder simply makes a scrawl, and writes in it the word "Seal." There is no merit in this contention. The recorder should copy such inscriptions on the seals.

It is next contended that the instrument is inoperative as an affidavit because the *jurat* as to the oaths of the Schoenfields is not signed or authenticated in any way. But the *jurat* of the officer is not the affidavit, nor, strictly speaking, any part of it. It is simply evidence of the fact that the affidavit was properly sworn to by the affiant. (*Williams v. Stevenson*, 103 Ind. 243; 1 Ency. of Pl. & Pr. 316, and notes.) It has been frequently held, both in this State and elsewhere, that affidavits for attachment are not void because the clerk or officer failed to affix his signature to the *jurat*. *Kruse v. Wilson*, 79 Ill. 233.

But it is contended that there is a difference between attachment cases and the case at bar, because in attachment cases the affidavit is merely the initial proceeding of the cause and may be amended at the trial, while in this case the statute requires that the record should disclose all the facts, and no parol evidence can add to that record, for creditors are not bound to look beyond the record. We are referred to *Coleman v. Goodnow*, 36 Minn. 9, *Stetson & Post Mill Co. v. McDonald*, 5 Wash. 496, and *Hill v.*

*Alliance Building Co.* 6 S. Dak. 160, as supporting appellant's contention. In the first two cases the court held the affidavit defective for want of a seal to the *jurat*, and the third case was based on the other two, in that case one *jurat* having the seal of the notary but no signature, and the other being by a foreign notary, with no seal or certificate of authority attached. We have held that a seal is not required by the statute to be affixed to a *jurat* to be used within the county of the officer. The statute provides nothing as to the *jurat* or mode of authenticating the affidavit. (*Schaefer v. Kienzel*, *supra*.) The decisions referred to, therefore, can hardly be regarded as authority on this point.

We are also referred to *McDermaid v. Russell*, 41 Ill. 489, where the court said: "The affidavit of non-residence does not appear to have been sworn to before any officer. For that omission it was no affidavit, and gave no authority to the court to enter an order for publication." No copy of the affidavit is given, and nothing appears to show how it appeared that no oath was administered. See, also, *Bickerdike v. Allen*, 157 Ill. 95.

The affidavit in this case begins with the names of the parties, and then follows, "being duly sworn, each for himself and herself, says." They are referred to as "affiants" in the body of the instrument a number of times, and the same concludes, "and affiants make this affidavit," and their names are signed. The oath of the attorney, Williams, is properly authenticated, but not so the oaths of the Schoenfields. The record in the recorder's office then disclosed, or at least contained the statement, that all the parties were sworn, but failed to show the evidence of the officer who administered the oaths to two of them. Is this such an affidavit as the statute contemplates, or is it void as to creditors because the evidence that the oath was actually and duly administered was not preserved by a proper certificate of the officer attached? We have carefully examined all the cases in this

court on the subject of defective affidavits to which we have been referred, and find that, as a general rule, they were held insufficient on account of defects in matters of substance, which could not be aided by parol. In *McDermaid v. Russell*, *supra*, it does not appear that there was any evidence that the affidavit was sworn to. But the case is different here. We think enough appears in the record, no objection being made to the substance of the affidavit, to show a substantial compliance with the statute, upon proof being made of the truth of the statement in the affidavit that the affiants were duly sworn,—that is, that the statements contained in the instrument were made on their respective oaths.

We are of the opinion that the *jurat* or certificate of the officer administering the oath is not a necessary part of the affidavit, but that it may be shown *aliunde* that the statements contained in the instrument were in truth and in fact made as they purported to be,—on oath duly administered by an officer duly authorized. The statute prescribes no form for the affidavit, and makes no provision as to the form in which the evidence of the oath shall be preserved or made to appear, but only requires that an affidavit shall be filed, etc. Of course, common prudence would dictate that a properly executed *jurat*, or certificate of the officer showing the oath, should be attached; but when attached it is not conclusive, but may be shown to be false, and if shown to be false, and that no oath was in fact administered, the instrument would not be an affidavit.

We are of the opinion that the record was sufficient to give notice to third persons that the alleged affidavit was made on oath, and that parol evidence was admissible on the trial to prove that the oath was actually taken. The judgment of the Appellate Court will therefore be affirmed.

*Judgment affirmed.*

WILKIN and CARTWRIGHT, JJ., dissenting.

THE PEOPLE *ex rel.* John G. Henderson

v.

WILLIAM J. ONAHAN *et al.**Opinion filed December 22, 1897.*

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1. CONSTITUTIONAL LAW—*section 29 of article 6 of the constitution construed.* The general words, "all laws relating to courts shall be general and of uniform operation," used in section 29 of article 6 of the constitution, are limited by the words which follow, requiring that all laws which relate to the "organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade" shall be general and of uniform application.

2. SAME—*Jury Commissioners act of 1897 is not unconstitutional, as violating section 29 of article 6 of constitution.* The Jury Commissioners act of 1897 (Laws of 1897, p. 243,) is not unconstitutional, as violating the provisions of section 29 of article 6 of the constitution, which require that laws relating to the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade shall be general and of uniform application.

3. SAME—*Jury Commissioners act of 1897 is not unconstitutional, as violating section 22 of article 4 of constitution.* The Jury Commissioners act of 1897 is not unconstitutional, as violating the provisions of section 22 of article 4 of the constitution, which forbid the passage of local or special laws regulating county affairs.

4. SAME—*Jury Commissioners act is not a local or special law.* The Jury Commissioners act of 1897, which provides that "in every county of this State now containing or which may hereafter contain more than 100,000 inhabitants" the judges of the several courts of record may choose persons to act as jury commissioners, etc., is not invalid, as being a local or special law, because now applicable only to Cook county.

5. STATUTES—*fact that law becomes inoperative does not render it void.* An act valid when passed but which becomes inoperative by reason of the failure of the electors of any county in the State to adopt it within the time designated therein, does not become void, but may be so amended by the legislature as to provide for its re-submission to the electors.

6. SAME—*an act complete in itself is not invalid because passed as an amendment to an inoperative act.* An act which possesses all the attributes of a complete statute in itself is not invalid because passed as an amendment to an act which had become inoperative.

WRIT OF ERROR to the Superior Court of Cook county;  
the Hon. FARLIN Q. BALL, Judge, presiding.

CHARLES S. DENEEN, State's Attorney, for relator:

The constitution (art. 4, sec. 22,) provides that "the General Assembly shall not pass local or special laws \* \* \* regulating the practice in courts of justice." Section 29 of article 6 also provides that "all laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform."

A law passed prior to the adoption of the constitution of 1870, authorizing the appointment of stenographic reporters by the courts of Cook county, was abrogated by section 29 of article 6 of the constitution. *People v. Rumsey*, 64 Ill. 44.

The prohibition of the enactment of "local or special laws" for certain purposes is equivalent to a command that general laws alone shall be enacted therefor, for the words "local or special" are clearly used in contradistinction to the word "general," and there being no power to enact "local or special" laws there can be no other than "general" laws enacted. *People v. Cooper*, 83 Ill. 584.

The conclusive point of all this lies in this fact, which is convincing against the law: The courts of Cook county are, although of the same grade and power as the circuit courts of the one hundred and one other counties of the State, now exercising greater powers than any other of said courts. It is useless to add to this proposition by argument. The point is patent and invincible.

ADOLPH MOSES, also for relator:

The act under consideration, by its own terms, is only applicable to Cook county, and is therefore unconstitutional under the case of *Devine v. Cook County*, 84 Ill. 590.

The act increases the "powers" of the courts, forbidden by section 29, unless the powers are general and uni-

form, conferred on all courts of the same grade or class in the State.

The act amends an act not then a live law, and is therefore void. The act which it attempts to amend was itself unconstitutional, and remains so as amended.

ROBERT E. JENKINS, and ROBERT S. ILES, for defendants in error:

The act of 1887 was duly passed and approved. It is among the published statutes of Illinois. (See Hurd's Stat. 1895, chap. 78, secs. 26-31.) It has never been repealed and was subject to amendment. The constitution of Illinois, in using the word "revived," seems to refer to just such a case as this. Const. art. 4, sec. 13.

In any case, this statute is complete in itself, and is good as an independent enactment, although purporting to be an amendatory act. *People v. Canvassers*, 143 N. Y. 84; *School Directors v. School Directors*, 73 Ill. 249; 23 Am. & Eng. Ency. of Law, 277; *Gandy v. State*, 86 Ala. 20; *People v. Pritchard*, 21 Mich. 235; *Timm v. Harrison*, 109 Ill. 593.

That a statute passed as an independent act will be treated as an amendment, when necessary to sustain it, is a settled rule in Illinois. *People v. Wright*, 70 Ill. 388; *English v. Danville*, 150 id. 92.

This statute applying to all counties that now have or that may hereafter have a population of 100,000, comes within the settled rule of construction in Illinois, which is, that an act general in its terms, and uniform in its operation upon all persons and subjects matter in like situation, is a general law, and not obnoxious to the objection that it is local or special legislation. The same rule sustains the act of 1887.

This principle was applied to a classification of cities according to population, for purposes of a jury law, in *Dunn v. Kansas City C. R. Co.* 131 Mo. 1. To a classification according to population, for special assessments, in *Cummings v. Chicago*, 144 Ill. 563. To a classification of incor-

porated cities, towns and villages, in *People v. Beardsley*, 70 Ill. 680. To a classification of claims, in *Ripley v. Evans*, 87 Mich. 217. To counties according to population, in *Knickerbocker v. People*, 102 Ill. 218. To a classification of municipalities determined by vote of the people, in *People v. Hoffman*, 116 Ill. 587. To a classification of cities, in *People v. Wright*, 70 Ill. 388. To a classification of lawsuits, in *Jensen v. Fricke*, 133 Ill. 171. To a classification of cities with reference to fares of street cars, in *Indianapolis v. Navin*, 47 N. E. Rep. 525. To a classification of corporations, and uniformity said to be "attained by its operation upon all persons in like situation," in *Iowa Railroad Land Co. v. Soper*, 39 Iowa, 112.

Mr. JUSTICE CARTER delivered the opinion of the court:

The plaintiff in error filed an information in the nature of a *quo warranto* in the Superior Court of Cook county, against the defendants in error, alleging that the defendants had intruded into, held and executed, and still hold and execute, without warrant or right, the office of jury commissioners, and calling upon them, the defendants, to show by what warrant they claimed to hold and execute said office. The defendants in their plea set forth that on the first Monday of July, 1897, the judges of the several courts of record of Cook county,—a county containing more than 100,000 inhabitants,—met together and chose them, the defendants, to be jury commissioners of said county, by virtue of an act of the legislature entitled "An act to amend an act entitled 'An act to authorize judges of courts of record to appoint jury commissioners and prescribe their powers and duties,'" approved June 9, 1897; that, having been so chosen, they duly qualified and entered upon the discharge of the duties of such office. The court overruled the demurrer of plaintiff in error to the plea, and held that said appointment under said statute, and the qualification of defendants in error, showed sufficient warrant and authority to hold said



office and perform the duties thereof. This writ of error was then sued out.

The only question raised or involved in the case is the constitutionality of the statute. Counsel for plaintiff in error contend that the act violates section 22 of article 4, and section 29 of article 6, of the constitution. Section 22, so far as claimed to apply here, provides: "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for \* \* \* regulating the practice in courts of justice, \* \* \* summoning and impaneling grand or petit juries." And said section 29 provides: "All laws relating to courts shall be general and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." If the act violates either of said provisions of the constitution it is, of course, void.

The first section of the act provides, in substance, that in every county which now has or which may hereafter have more than 100,000 inhabitants, the judges of the several courts of record of such county, or a majority of them, shall choose three competent and discreet electors, who shall be known as jury commissioners; provides for their qualification, and for removals, and the filling of vacancies. Section 2 provides that said commissioners shall, upon entering upon their duties, and every four years thereafter, prepare a list of all electors between the ages of twenty-one and sixty years, possessing the necessary legal qualifications for jury duty, to be known as the jury list, which list may be revised annually, in their discretion; provides also for entering upon books to be kept, the names of each person on the list, his age, occupation, residence, whether a householder residing with his family, and whether or not a freeholder. Section 3 gives the commissioners power to appoint, with the approval of

said judges, a deputy in each precinct, to furnish lists of qualified electors and also other required information, to summon and examine electors as to their qualifications for jury duty, and to administer oaths in discharge of their duties. Section 4 provides that the commissioners shall, from time to time, select from the jury list the requisite number of names, each name to be written upon a separate ticket, with the age, place of residence and occupation, and shall place them in a box to be kept for that purpose, to be known as the "jury box," and which box shall at all times contain not less than 15,000 names. In like manner a grand jury box shall be kept, the names to be selected from the jury list and deposited in like manner in such box, and the number to be at all times not less than 1000. The jurors who are thus selected and whose names are placed in these boxes are to be, as near as may be, residents of different parts of the county and of different occupations. One or more of the judges of the court must certify to the clerk of the court the number of jurors required for each term, and the clerk shall, in the presence of at least two of the commissioners and their clerk, if they have any, draw at random from said jury box, after the same shall have been well shaken, the necessary number of names, and certify them to the sheriff to be summoned according to law, and if more jurors are needed they are to be drawn and summoned forthwith in the same manner. Section 5 provides that the grand jurors shall be drawn and summoned in like manner, and that at the end of each term of court the commissioners shall check off from the jury list all who have served, and their names shall not again be placed in either jury box until all others on the list shall have served or been found disqualified or exempt; the names of all who are qualified and have been excused shall be again placed in the jury box. Section 6 provides for the compensation and payment of the commissioners and their assistants.

It must be conceded that if the effect of this statute is to regulate the practice of courts in counties of over 100,000 inhabitants, or to affect such courts in any way so that their organization, jurisdiction, powers, proceedings or practice shall no longer be uniform with that of other courts in the State of the same class or grade, the statute is void and must be so declared, even although we should hold it not to be a local or special law prohibited by section 22 of article 4 of the constitution, for it is the clear purpose of section 29 of article 6 to require and maintain uniformity in the organization, jurisdiction, powers, proceedings and practice of all courts of the same class or grade in the State, so far as regulated by law, and in the force and effect of their process, judgments and decrees. It is, of course, true, that the construction of this section might be affected by other provisions of the constitution where statutes are enacted under them, such as section 20 of article 6, providing for the establishment of probate courts in each county having a population of over 50,000, (*Klokke v. Dodge*, 103 Ill. 125,) and, possibly, in some respects by the provisions relating to the courts of Cook county. Thus, it was said in *Knickerbocker v. People*, 102 Ill. 218, (on p. 226,) that section 26 "must be so construed as to harmonize with and give effect to the 20th section in the sense we have construed it;" and in reference to section 26 it was further said: "It is manifest that the introductory clause of that section cannot be given effect according to the literal meaning of the broad terms in which it is conceived. To do so would lead to the most absurd consequences, and would be in direct conflict with the decisions of this court. The words are, 'all laws relating to courts shall be general and of uniform operation.' Notwithstanding this provision the legislature is constantly in the habit of passing special laws fixing the commencement and the length of the terms of particular courts, which are manifestly laws relating to courts, and such acts, though neither uniform in their operation, nor

general, within the sense of the constitution, are universally recognized as constitutional and valid. In discussing this matter it was said in *Karnes v. People*, 73 Ill. 274: "Constitutions, like all other laws, must have a reasonable and practical interpretation. To give this language a literal application would require all courts in the State to meet on the same day and the terms to be of the same length. This could not have been intended, because it must have been apparent to the framers of that instrument that such a thing could never be carried into effect." As there held, the general terms employed in the introductory clause of that section are limited by what follows, which requires that all laws which relate to the organization, jurisdiction, powers, proceedings and practice of courts shall be general and of uniform application, applying to all courts of the same class or grade.

The first question presented, then, is this: Does the act in question relate to or affect the organization, jurisdiction, powers, proceedings or practice of courts in counties containing 100,000 inhabitants? If it does, the act is void, because it violates said section 26. It is not contended that the organization or jurisdiction of such courts is in any way affected by this statute, but the argument of plaintiff in error tends to the conclusion that the powers, proceedings and practice of the court are changed or materially affected. It is not contended that the statute takes away any of the common law powers of the courts to summon and impanel juries, but the argument on this branch of the case is that certain new powers are conferred by the act, and we are referred to *People v. Rumsey*, 64 Ill. 44, where it was held that a statute applicable only to the courts of Cook county, authorizing them to appoint stenographic reporters, was abrogated by this provision of the constitution upon its adoption in 1870; and to *O'Connor v. Leddy*, 64 Ill. 299, holding that by the adoption of the constitution a prior law regulating the practice in the circuit court of Cook county, and requir-

ing the defendant to file an affidavit of merits with his plea, was abrogated. See, also, *Mitchell v. People*, 70 Ill. 138, and *Devine v. Commissioners of Cook County*, 84 id. 590.

The two cases first cited decide the principle, but they do not help us to determine whether or not the statute here involved affects the powers, proceedings or practice of the courts in such counties. It is, however, said, that the act confers upon the judges, or a majority of them, of the several courts of record in a county having 100,000 inhabitants, the power to appoint the jury commissioners. This is true, and it also authorizes such judges to approve the appointment by the commissioners of assistants and a clerk, and to approve their warrants drawn for their expenses, but no additional power is conferred upon the courts of such counties by these provisions. It has been held that power may be lawfully conferred upon judges of courts to appoint park commissioners. (*People v. Morgan*, 90 Ill. 558; *People v. Nelson*, 133 id. 565.) Notwithstanding this power in the judges to appoint, the powers, proceedings and practice of the courts remain the same as before. The only provision of the statute which might seem to add to the powers of the court is that which authorizes the court to compel the attendance of electors when summoned by the commissioners, and to give testimony before them, by attaching for contempt, or otherwise, in the same manner as the production of evidence may be compelled before said court. No point, however, has been made in the argument on this provision, and we shall not further consider it, for if it were held invalid, the rest of the statute, as probably conceived by counsel, would not thereby be rendered void, for it would be sufficiently complete in itself to stand and be enforced without said provision. No opinion, however, is expressed whether said provision is valid or not, as that question would not necessarily arise except in a proceeding to enforce it.

The statute does not relate to or affect the proceedings or the practice of the court. The same officer—the clerk of the court—draws the names of the jurors from the jury box, and they are summoned to appear in court in the same manner as under the previous general law. The fact that the drawing is done in the presence of two of the commissioners, instead of the county clerk and the county judge, in nowise affects the proceedings or practice of the court. The radical change consists, not in any proceedings or practice of the court, but in the selection, from the body of electors of the county, of a jury list, from which the names are placed in the jury box as provided by the statute, from which jurors are drawn, as required, by the same officer authorized to draw them in other cases. Under the statute heretofore applicable to all of the counties in the State, this jury list has been furnished by the county boards, and it would seem that the most that could be said would be, that power in the respect mentioned has been taken from the county board in counties having 100,000 inhabitants, and conferred, with some additional authority, upon the jury commissioners. So far as the statute dispenses with the presence of the county judge and county clerk in such counties at the drawing of the jurors for any term of court, it is sufficient to say that the county court is not, in any of the respects mentioned in the constitution, affected thereby.

We are unable to see, from any reasonable standpoint, how the proceedings or practice of the court can be affected by this statute. If it were held to be a local or special statute, it would seem to come more nearly in conflict with the provision in section 22 forbidding the passage of any local or special law regulating county affairs. It is not, however, contended by plaintiff in error that this provision of the constitution is violated, but it is claimed that the statute is local and special in its application, and so appears from the terms employed in it, and that it is inhibited by other provisions of said section 22,—that

is, that it regulates the practice in courts of justice, and provides for summoning and impaneling grand and petit juries. It is clear, we think, from what has already been said, that the statute neither regulates the practice in courts of justice nor provides for summoning or impaneling juries. Both grand and petit juries must be summoned and impaneled in such counties, so far as regulated by law, as before the passage of the act in question.

Besides, we are of the opinion that this statute is not a local or special law, within the meaning of the constitution. While in some parts of the argument in *Devine v. Commissioners of Cook County*, 84 Ill. 590, language is used which might lend color to the contention that the legislature has no power to classify counties in respect to population, except in those cases expressly provided for in the constitution, yet the decision was based upon the ground that the act there in question, by its very terms, precluded it from having any application to any county except the county of Cook, and it was said that an act "designating counties, as a class, according to a minimum population, which makes it absolutely certain but one county in the State can avail of the benefits of a law applicable to such class, cannot but be regarded as a mere device to evade the constitutional provision forbidding special legislation." But as said in the later case of *Cummings v. City of Chicago*, 144 Ill. 563 (on p. 567): "There the power given by the act, necessarily, not only by limitation of population but by the wording of the statute and the purposes and objects declared, related to a single county; and, moreover, the right to exercise the powers granted was limited to six years, within which time it was impossible that any other county could reach the population designated." The statute here involved is not open to such construction, for, although the court might know judicially that at present no county in the State but Cook has the required population, it is matter of common knowledge, which, it is fair to assume, influenced

the legislature, that other counties are near to the prescribed limit in population, and contain cities of such size and density of population that the method of selecting the jury list applicable to less populous communities cannot, with due regard for the public welfare, continue to be applied. We cannot believe that it was the intention of the framers of the constitution, by said section 22 prohibiting local or special legislation in the cases therein enumerated, and which was intended to eradicate then well known existing evils, to forbid the passage of any law relating to the subjects enumerated in said section, unless by its terms and effect it should apply in all cases to all the people of the State and to every local subdivision thereof. To so hold would be to give to the constitution the strictest construction, and one never intended by its framers. Constitutions, like statutes, must receive a reasonable construction, and in accord with this view it was held in *Cummings v. City of Chicago*, *supra*, that "it has been determined, and has become the settled rule of construction in this State, that an act general in its terms, and uniform in its operation upon all persons and subject matter in like situation, is a general law, and not obnoxious to the objection that it is local or special legislation." (*People v. Hoffman*, 116 Ill. 587.) Before an act of the legislature can be held unconstitutional it must be clear that it is so. All doubts are to be resolved in favor of the validity of the statute. And in this connection it is to be borne in mind that the constitution is not a grant, but is a limitation, of power, and that the legislature possesses all of the power of the State not denied to it by the organic law. Unless, therefore, it clearly appears that the act in question is a local or special law in the sense those terms are used in the constitution, it is not in conflict with said section 22.

Some support of the view we have taken is found in the fact that section 29 of article 6 provides not only that all laws relating to courts shall be general, but also of



uniform operation, thus recognizing the view that a law relating to the organization, jurisdiction, powers, proceedings and practice of courts of the same class or grade might be general and still not of uniform operation. So, even if it were held,—which we do not hold,—that the statute in question relates to the powers, proceedings or practice of courts, it might still be a general law, but would be void under said section 29 only, because not of uniform operation. Holding, then, that the act is a general and not a special or local law, it is immaterial to inquire whether or not it regulates county affairs.

We cannot agree with counsel in their contention that the statute shows on its face that it was intended to apply only to Cook county because in the latter part of the first section it is provided that “the majority of the judges of such county may remove either of such commissioners,” etc. The power to appoint the commissioners is in the first part of the act vested in “the judges of the several courts of record of such county, or a majority of them.” In counties other than Cook, as our judicial circuits are at present constituted, this would include, with other judges of courts of record of such county, all the circuit judges of the circuit, whether residing in the county in which the jury commissioners were to be appointed or not, and the judges referred to in the latter part of the section are clearly the same upon whom the power to appoint is conferred.

Counsel for the respective parties have in their able arguments cited and commented on many cases which we have not deemed it necessary to refer to, but reference may be had to *Dunn v. Kansas City C. R. Co.* 131 Mo. 1; *State v. Reitz*, 62 Ind. 159; *Van Riper v. Parsons*, 40 N. J. L. 123; *Bumstead v. Govern*, 47 id. 368; *Hunzinger v. State*, 58 N. W. Rep. (Neb.) 194; 23 Am. & Eng. Ency. of Law, 148; *Ripley v. Evans*, 87 Mich. 217.

The next contention is, that the statute is an amendatory act only,—that it purports to amend an act on

the same subject, passed in 1887, which never went into effect, and was invalid when said amendatory act was passed. The statute of 1887 provided for the submission of the question to a vote of the electors of any county on the Tuesday after the first Monday of November in 1887, whether or not there should be appointed a jury commission, and that such commission should be appointed if so decided by a majority of the votes cast at such election. That act was not adopted by any county at the time designated, and could not have been at any time since then, without amendment, but it is contended that, as it contained no provision for submission at any other time, it became null and void and therefore incapable of amendment. It is, of course, true that a void law cannot be amended. The act of 1887, however, seems to have been passed in compliance with the constitution, but never came into full operation as a law because the contingency upon which it was to become operative never happened, and, it must be admitted, never can happen according to its terms as originally enacted. Still, it would seem that, as it was valid when passed, while it might remain inoperative it would not necessarily become invalid, and the legislature might so amend it as to provide for its resubmission. (*Home Ins. Co. v. Swigert*, 104 Ill. 653.) But we do not deem it necessary to decide whether that statute became invalid and incapable of amendment or not, for we are satisfied the act here involved possesses all of the attributes of a complete statute in itself. As said in *School Directors v. School Directors*, 73 Ill. 249 (on p. 252): "Here we have a law possessing all the requisites of a valid statute passed by the General Assembly, containing clear requirements capable of being carried into effect, \* \* \* and we have no right, simply because there is a mistaken reference to a previous statute, to defeat that will. \* \* \* An unessential false description can never defeat a grant, contract or other instrument, nor should it defeat a statute." To the same effect it was said in *People v. Canvassers*,

143 N. Y. 84, that "the enactment of this law is put into the form of an amendment of a law which was standing upon the statute books, and whether that earlier law, by force of subsequent legislation, had become inoperative is wholly immaterial. The only question is, has the legislature, in the enactment complained of, expressed its purpose intelligibly and provided fully upon the subject? If it has, then its act is valid and must be upheld. That is the case here." *People v. Pritchard*, 21 Mich. 235; *People v. Wright*, 70 Ill. 388.

The statute here in question is full and complete without reference to any other, and so much of the act of 1887 as is included in it may be regarded as re-enacted. The statute is a valid law, and must be so declared.

The judgment of the Superior Court is affirmed.

*Judgment affirmed.*

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JAMES H. WALKER *et al.*

v.

WILLIAM WOOD *et.al.*

*Opinion filed December 22, 1897.*

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1. PRINCIPAL AND AGENT—*single act as agent does not raise presumption of appointment.* The fact that one has assumed to act as the agent of another in a single transaction does not raise a presumption of appointment as such agent by the principal acted for.

2. SAME—*whether an alleged unauthorized act was ratified is a question of fact.* Whether an alleged unauthorized act of one party in signing and acknowledging articles creating a limited partnership as attorney in fact for another party was ratified by the latter, is a question of fact finally settled by the Appellate Court's judgment of affirmance.

3. NOVATION—*all parties to original contract must consent to the new one.* It is essential to a novation that all parties to the original contract consent to the substitution of the new one, though such consent may be either express or implied.

4. SAME—*what facts do not, in law, establish consent to novation.* Neither notice to a creditor of a partnership that the latter has

become incorporated and that the corporation has assumed the firm debts, nor partial payment of the creditor's claim by the corporation, nor a demand by the creditor on the receiver of the corporation for payment of the claim and acceptance of dividends thereon, establishes the creditor's consent to the novation as a matter of law, but such facts may all be considered in determining, as a question of fact, whether there was an implied consent.

*Walker v. Wood*, 69 Ill. App. 542, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. PHILIP STEIN, Judge, presiding.

WILLIAM R. ODELL, for appellants.

PARTRIDGE & PARTRIDGE, for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

James H. Walker, Columbus R. Cummings and William B. Howard were partners in the dry goods business in Chicago under the firm name of James H. Walker & Co., and in December, 1892, that firm owed appellees, composing the firm of William Wood & Co., of Philadelphia, \$1739.98 for goods purchased. At that time the corporation of James H. Walker Company was formed, and purchased the assets and assumed the liabilities of the firm of James H. Walker & Co. The corporation continued the business and sent a notice to appellees, which they received in January, 1893, stating that it had assumed the debts of the firm. Afterward appellees sold goods to the corporation, and on June 17, 1893, received from it \$500, which they applied on the firm debt which had been assumed. On August 4, 1893, the corporation became insolvent and a receiver was appointed, before whom appellees proved their claim, alleging the indebtedness of the firm to them on December 31, 1892, and that the corporation assumed and agreed to pay the same. Very shortly after-

ward appellees brought this suit against the members of the firm. Dividends to the amount of \$892.79 were paid on the claim by the receiver of the corporation. Columbus R. Cummings and William B. Howard each filed a plea, denying joint liability with his co-defendants, and each defendant also filed a plea that the corporation assumed and agreed with appellees to pay the amount of their claim, and that appellees accepted the promise of the corporation and released the members of the original firm. The issues were heard before the court without a jury. William B. Howard succeeded in his defense, but there was a finding and judgment against James H. Walker and Columbus R. Cummings for \$346.59,—the balance due on the claim. The Appellate Court affirmed the judgment and granted a certificate of importance, by virtue of which appellants have brought the case to this court.

The separate defense of the defendant Cummings was, that the firm of James H. Walker & Co. was a limited partnership, formed in accordance with the laws of this State, in which he was a special partner and James H. Walker was the general partner. His sworn plea denying joint liability cast upon plaintiffs the burden of showing the partnership. (*Kennedy v. Hall*, 68 Ill. 165; *Smith v. Knight*, 71 id. 148.) To show such partnership plaintiffs offered in evidence a written stipulation of the parties, made for the purpose of the trial, admitting that on December 27, 1892, the defendants were engaged in the dry goods business under the firm name of James H. Walker & Co., and that said firm was at that time indebted to plaintiffs for goods sold and delivered to said firm in the amount named. Under this stipulation all the defendants would be liable unless some of them succeeded in relieving themselves from such liability by showing that the partnership was not general. The evidence offered for this purpose consisted, alone, of articles for the formation of a limited partnership, in which James H. Walker was a general partner and Cummings and Howard spe-

cial partners contributing property to the partnership. The articles were signed in the name of defendant Cummings "By Otho S. Gaither, his attorney in fact," who acknowledged the same as such attorney in fact before a notary public. The articles were recorded, together with an affidavit of Walker that the property contributed by Cummings and Howard had been contributed actually and in good faith. There was no evidence of any authority of Otho S. Gaither to act as attorney in fact for Cummings, and the court held a proposition of law submitted by plaintiffs that the certificate or statement of partnership was not sufficient, in law, to form a limited partnership as to him. The holding of such a proposition is assigned for error, and it is said that Gaither's acknowledgment is of itself sufficient to show his authority. Where one person has only assumed to act as agent for another in a single transaction, we do not understand that the act alone raises a presumption, in law, of an appointment as agent to do the act. It is also urged that, if the act was without authority, Cummings afterward ratified it so as to give it validity. If that could be done, the question whether it was done was one of fact. The only evidence on that subject was the fact that he engaged in business as a member of the firm, and the affidavit of Walker, filed with the articles, that the property had been contributed to the firm. There was no proposition of law submitted on that question and it was not raised in any way as a question of law. So far as it is concerned the judgment of the Appellate Court is final.

The court sustained demurrers to the several amended pleas of the defendants, setting up the facts, hereinbefore stated, of the agreement by the corporation with the firm to pay the outstanding indebtedness, the notice to the plaintiffs of the assumption of such obligation, and the proof of the claim by plaintiffs against the corporation before the receiver, and the court also modified propositions of law submitted by the defendants that

such facts released and discharged the defendants. By the modification the court held that such facts were all proper to be considered upon the question of fact whether the plaintiffs did release and discharge the defendants and accept the corporation as their debtor, but that they were not necessarily conclusive as a matter of law. We regard the modification as correct. The assumption of outstanding liabilities by the corporation was a matter of agreement between it and the defendants, which could not affect the rights of the plaintiffs unless they assented to it in some way which amounted to an agreement to accept the corporation as alone liable for the indebtedness. It is essential to a novation that all the parties to the contract for which the new one is substituted consent to it. (16 Am. & Eng. Ency. of Law, 867; *Hayward v. Burke*, 151 Ill. 121.) The assent or agreement may be either express or implied, but neither knowledge of the arrangement between the corporation and the firm, nor the partial payment of the debt, nor a demand for the payment, like the filing of the claim against the corporation, nor all combined, necessarily establishes such assent or agreement as a legal conclusion. (16 Am. & Eng. Ency. of Law, 904; *Rayburn v. Day*, 27 Ill. 46; *Goodenow v. Jones*, 75 id. 48; *Hayward v. Burke*, *supra*.) All the facts and circumstances of the case are proper to be submitted to the jury for the purpose of determining whether the creditor has impliedly assented to the discharge of the old firm. (Parsons on Partnership, 426.) This is what the court held by the propositions as modified.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* John Y. Thorp *et al.*

v.

BOARD OF TRUSTEES OF TOWN OF NORMAL.

*Opinion filed December 22, 1897.*

1. CONSTITUTIONAL LAW—*purpose of section 22 of article 3 of the constitution, concerning special legislation.* By section 22 of article 3 of the constitution, which provides that the General Assembly shall not pass local or special laws incorporating cities, towns or villages or changing or amending the charter of any city, town or village, it was designed that no city, town or village should thereafter become incorporated, or have its charter changed or amended, except by general law.

2. SAME—*legislature cannot pass laws creating or perpetuating dissimilarity of organization in municipalities of same class.* It is not admissible, either by the letter or the spirit of the constitution, that dissimilarity in character of organization or powers between municipalities of the same class or grade shall be created or perpetuated by enactments of the legislature.

3. SAME—*classification of municipalities based on existing difference of charters is unconstitutional.* An act which attempts to put certain special charter municipalities into a class by themselves, basing such classification, not upon any rule for classifying municipalities or any circumstance affecting them differently from other municipalities in the State, but merely upon a different provision in their charters from those of other municipalities and a preference of the electors for such provision, is unconstitutional.

4. SAME—*act of 1897, authorizing special charter cities to organize under general law and retain provision of charter, is unconstitutional.* The act of 1897, (Laws of 1897, p. 99,) which authorizes municipalities existing under special charters containing a special prohibitory license clause to re-organize under the general law for the incorporation of cities, towns and villages and still retain such special prohibitory clause, is unconstitutional.

ORIGINAL petition for *mandamus*.

B. H. McCANN, THOMAS F. TIPTON, and THOMAS W. TIPTON, for relators:

A statute is not local or special merely because it applies to conditions which exist in only one place. It is enough that it applies to those conditions in whatever



place they may arise. *Park Comrs. v. McMullen*, 134 Ill. 170; *Trausch v. Cook County*, 147 id. 534.

Whenever an act of the legislature can be construed and applied so as to avoid a conflict with the constitution and give it the force of law, such construction will be given. *Gaines v. Williams*, 146 Ill. 454.

Every presumption is in favor of the validity of a statute, and every reasonable doubt will be resolved to sustain it. *People v. Nelson*, 133 Ill. 565; *Wunderle v. Wunderle*, 144 id. 40; *Gaines v. Williams*, 146 id. 450; *Railroad Co. v. Smith*, 62 id. 268; *Timm v. Harrison*, 109 id. 593; *People v. Hazelwood*, 116 id. 319; *McGurn v. Board of Education*, 133 id. 122; *Field v. People*, 2 Scam. 79; *Lane v. Dorman*, 3 id. 239; *People v. Marshall*, 1 Gilm. 672; *People v. Reynolds*, 5 id. 1.

The party who wishes to pronounce a law unconstitutional takes upon himself the burden of proving, beyond a reasonable doubt, that it is so. *Gaines v. Williams*, 146 Ill. 450.

A law may be general and yet be operative in a single place where the conditions necessary to its operation exist. *People v. Hoffman*, 116 Ill. 587; *People v. Cregier*, 138 id. 405; *Trausch v. Cook County*, 147 id. 536; *Park Comrs. v. McMullen*, 134 id. 170.

ROBERT L. FLEMING, (J. H. ROWELL, of counsel,) for defendants.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The town of Normal was incorporated by an act of the legislature approved February 25, 1867. The relators, on August 18, 1897, presented to the defendants, the president and board of trustees of said town, a petition, signed by one hundred and three residents and legal voters of the town, asking for a submission to the electors, at a special election, of the question whether the town should become incorporated under the general act for the incor-

poration of cities and villages, in force July 1, 1872, retaining its prohibitory license clause, as provided by an act of the legislature in force July 1, 1897. The defendants refused to call the election, and relators filed the petition in this case to compel them to do so. The cause has been submitted on a stipulation of the defendants that the statements of fact in the petition are true.

The act under which relators claim the right to have the election called is as follows:

"An act providing that cities, villages and incorporated towns now under special charters having a special prohibitory license clause therein, may re-organize under the general law and retain such prohibitory license clause by making the same a public act by a majority vote at the election for such re-organization.

"SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That any city, village or incorporated town in this State now existing under or by virtue of any special charter having a special prohibitory license clause therein, desiring to re-organize under the general law, being 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872, in force July 1, 1872, in such cases made and provided, and not wishing to relinquish such prohibitory license clause, may do so by making the same a public act by a majority vote at the election for such re-organization.

"Sec. 2. The ballots to be used at such election shall be in the following form: 'For city organization under general law by retaining prohibitory clause,' or 'Against city organization under general law by retaining prohibitory clause.' The judges of such election shall make returns and cause the result of such election to be entered upon the records of such city. If a majority of the votes cast at such election shall be for city organization under general law by retaining prohibitory clause, such city shall thenceforth be deemed to be organized under the

general law and such prohibitory clause shall thereby be declared a public act, and shall have the same force and effect as if made a part of said general law; and all acts or parts of acts in the general law in conflict with the same shall be of no force and effect."

Many puzzling questions at once present themselves as to what the legislature could have meant by the provisions of this act. Among these questions is the meaning of the phrase "a special prohibitory license clause." There is no allusion to the liquor traffic, and if a special prohibition against granting licenses was meant, the language refers equally to all the other things and occupations which any city, town or village may have been authorized to license or prohibit. Counsel for relators say that the provision relates to a prohibition against issuing licenses for the particular business of selling liquor. If their interpretation is accepted there is a serious question whether the town of Normal comes within the provision. Its charter provides that the town council shall not grant licenses, generally, for the sale of liquor, but may grant such licenses to two discreet persons to sell liquors for specified purposes. The granting of licenses for the sale of liquor is not prohibited absolutely, but the power is merely limited and regulated. Counsel on both sides, however, desire a decision upon the constitutionality of the act, on the assumption that it applies to the town of Normal and that it is sufficiently definite in its meaning and provisions to be enforced, and as such a decision will dispose of the case we comply with the request.

Section 22 of article 3 of the constitution provides that the General Assembly shall not pass local or special laws incorporating cities, towns or villages, or changing or amending the charter of any town, city or village. In the case of *People v. Cooper*, 83 Ill. 585, it was said concerning this provision (p. 590): "It was designed that no city, town or village should thereafter become incorporated, or have its charter changed or amended, except by vir-

tue of a general law. \* \* \* It follows that all cities, all towns or all villages becoming incorporated, and all cities, all towns or all villages having their charters changed or amended, must, to the extent of such change or amendment, be brought under the same law. It is not admissible, either by the letter or the spirit of the constitution, that dissimilarity in character of organization or powers, in municipalities of the same class or grade, shall be created or perpetuated by enactments of the General Assembly." Again, in *Devine v. Commissioners of Cook County*, 84 Ill. 590, in speaking of a claim that a statute general in its terms but applicable to only one county was a general law, the court said (p. 593): "That construction, if once adopted, might with equal propriety be extended so as to warrant a classification of other municipalities, as cities, towns and villages, and the evils of class or special legislation that existed under the former constitution would be revived, only in a modified degree."

Prior to the adoption of this constitution the cities, towns and villages of the State were incorporated under special charters granted by the legislature. Most of them have been brought under the general law of 1872, but a few still retain their special charters, and among the latter those whose charters contain any provision that could be construed as coming within the provisions of this act are still less in number. The act attempts to put those corporations having such a provision in a class by themselves, not based upon any rule for classifying municipalities, or any circumstance affecting them differently from other cities, villages or towns in the State, but based merely upon an existing difference in their charters from those of other cities, villages and towns, and a preference of the electors for such different charter with different powers from those given to other like corporations. There is no other test proposed by the law except "not wishing to relinquish such prohibitory license clause," and a vote expressing such wish. Upon the will of the

electors upon that question being expressed at an election, the act provides that whatever provision may be contained in the special charter shall thereby be declared and made a public enactment of the General Assembly, and that all acts or parts of acts in the general law in conflict with the same shall be of no force or effect. It is intended by the act that such municipality shall then be organized with a charter different from others of the same grade. The provisions of special charters are as diverse as the opinions and wishes of those who procured them, and this act does not even require or contemplate uniformity among the cities, towns or villages which are attempted to be specially legislated for, but the provisions of the special charters, however different they may be, are to become parts of the new charters attempted to be created. If the legislature may do that as to the subject of licenses or the sale of liquor, there is no provision of any special charter which it may not authorize to be retained under the general law, and thus perpetuate the dissimilarity in character of organization and powers in municipalities of the same class or grade, which this court has said could not be done.

We regard the act as unconstitutional, and no case that has been referred to by counsel for relators conflicts with this view. It is within the power of the legislature to enact laws uniform in their operation upon all those who come within the relations and circumstances for which they provide, but this act is not of that character. The prohibition of the constitution does not apply to the adoption of ordinances by cities, villages or towns, but it prohibits the General Assembly from passing special laws of this kind.

The writ of *mandamus* will be denied.

*Mandamus denied.*

THE INDIANA MILLERS' MUTUAL FIRE INS. CO. *et al.*

v.

## THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed December 22, 1897—Rehearing denied February 2, 1898.*

1. PLEADING—*when judgment in action of debt may exceed ad damnum.* In an action of debt to recover a statutory penalty the damages may be laid in the declaration as nominal and a judgment be entered for substantial damages.

2. APPEALS AND ERRORS—*appeal lies to Supreme Court where the validity of a statute is involved.* Under section 8 of the act on courts, as amended in 1887, (Laws of 1887, p. 156,) appeals in cases involving the validity of a statute lie directly to the Supreme Court.

3. SAME—*decision of Appellate Court reviewed only as to errors properly assigned.* The Supreme Court can review the decision of the Appellate Court only as to errors there properly assigned and insisted upon and upon which such court had jurisdiction to pass.

4. SAME—*appealing to Appellate Court waives right to assign errors cognizable only by Supreme Court.* Appealing to the Appellate Court and submitting the case for its determination upon assigned errors which it may properly consider, is a waiver or abandonment of any assignment of error which can be reviewed only by the Supreme Court on direct appeal.

5. PRACTICE—*points relied upon for reversal cannot be first raised in reply brief.* Points relied upon for reversal must be raised in the appellant's original brief and argument, to enable opposing counsel to be heard thereon, and cannot be considered when raised for the first time in the reply brief.

*Indiana Millers' Fire Ins. Co. v. People*, 65 Ill. App. 355, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Jackson county; the Hon. JOSEPH P. ROBERTS, Judge, presiding.

MYRON H. BEACH, for appellants.

M. T. MOLONEY, Attorney General, JOHN M. HERBERT, State's Attorney, (R. J. STEPHENS, and HILL & MARTIN, of counsel,) for the People.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an action of debt, begun in the circuit court of Jackson county, in the name of the People of the State of Illinois, against the appellant company and Edward Dinsley, to recover the penalty prescribed by section 4 of the act in force July 1, 1879, against foreign insurance companies for transacting business in this State in violation of the requirements of section 1 of that statute. The declaration upon which the trial was had was of two counts, each charging a distinct offense. It was stated in the abstract that the defendants filed pleas to the merits, but what those pleas were does not appear. Issues were joined, and a trial by jury resulted in a verdict and judgment for plaintiff against each of the defendants for \$1000. The defendants moved for a new trial and in arrest of judgment, and both of these motions being overruled and judgment entered upon the verdict they appealed to the Appellate Court for the Fourth District, and there assigned numerous errors questioning the regularity of the proceedings in the trial court. The Appellate Court held that the judgment against each of the defendants was erroneous, but corrected the error by entering judgment in that court against the defendants jointly for \$1000 and overruled the other errors assigned. From that judgment this appeal is prosecuted.

In the original brief and argument of appellants but two grounds of reversal are urged. Each count of the declaration concludes "to the damage of the plaintiff of one cent." It is insisted that, inasmuch as the judgment largely exceeds that nominal sum, the circuit court erred in overruling the defendants' motion in arrest of judgment, and that the Appellate Court erroneously entered judgment for \$1000 against them in that court. Many cases are cited which are supposed to sustain the position that, regardless of the cause of action, the judgment in debt can in no case exceed the *ad damnum*; but the cases

are not in point. This is an action on a statute, to recover a penalty, and as said by the Appellate Court, in such cases the damages inserted in the declaration need only be nominal. There was no merit in the motion in arrest of judgment.

The second point made is, that the statute under which the action was brought is invalid, being in violation of the constitution of the State. We do not regard that question as properly before us. Whether the pleas questioned the validity of the statute or not, as above indicated, does not appear. It is said, however, in the argument, that the question was raised upon the trial by the refusal of an instruction asked by the defendants. It is immaterial, in our view of the case, whether the validity of the statute was properly in issue before the trial court and jury or not. Our statute expressly provides that cases involving the validity of a statute shall be taken directly to the Supreme Court. (3 Starr & Curtis' Stat.—2d ed.—chap. 110, sec. 88, p. 3114.) In this case, as we have already stated, the defendants elected to prosecute their appeal to the Appellate Court and there assign errors upon the record as to the regularity of the proceeding below, which was decided adversely to them in that court, and they now bring the record to this court from the Appellate Court and attempt to urge the unconstitutionality of the statute on which the action is based. This, we entertain no doubt, they cannot do. The appeal to the Appellate Court waived any question which could be brought to this court for review. By direct appeal they voluntarily went to the Appellate Court and there assigned errors over which that court had jurisdiction and could properly pass. They did not, nor could they, assign for error there the ruling of the trial court as to the validity of the statute, because the Appellate Court had no power whatever to pass upon that question. Clearly, this court can review the decision of the Appellate Court only upon errors there properly assigned and insisted upon over



which it had jurisdiction to pass. Suppose we should find (as we must, so far as the questions are raised here,) that the Appellate Court decided correctly on all the errors assigned upon which it had jurisdiction, but should conclude that the statute is invalid; certainly we could not say that the Appellate Court erred. In that case we would be compelled to hold that it neither could nor did decide upon the questions upon which we based our decision.

If the validity of the statute was involved in the trial court, and the defendants desired to insist upon its invalidity, their remedy by appeal was clearly pointed out by the statute,—that is, a direct appeal to this court; and by choosing to go to the Appellate Court and there submitting their case for review they abandoned the contention that the law was unconstitutional. They were not entitled, by indirection through the Appellate Court, to bring that issue before us, thus availing themselves of an appeal first to that court and then to this. To hold otherwise would be to abrogate a plain and well understood provision of the statute, by which alone the right to an appeal exists.

In the reply brief counsel say that if this court is of the opinion that the validity of the act is not properly before it, we still have jurisdiction of the case upon the question presented by the judgment, which exceeds the amount of damages laid in the *ad damnum* of the declaration, (which we have already disposed of,) and also upon the construction placed upon the statute by the trial court in plaintiff's third instruction and by the Appellate Court in its opinion and judgment. The practice of presenting cases in this manner cannot be tolerated. Points relied upon for reversal must be made in the original argument of appellants or plaintiffs in error, thus giving opposing counsel an opportunity to be heard upon them, and cannot be raised for the first time in an appellate court by a mere reply brief and argument. This is so

manifest that no argument is needed in support of the proposition, and if it were otherwise, nothing is here shown against the instruction mentioned.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## THE WEST CHICAGO STREET RAILROAD COMPANY

v.

MARIAN CARR.

*Opinion filed December 22, 1897.*

1. NEGLIGENCE—*what sufficient to go to jury on question of defendant's negligence.* In an action for injuries received by a passenger from a collision between a street car and a wagon, evidence that a bystander saw the danger and called to the driver of the car to stop, together with testimony showing the position of the tracks, the car and the wagon at and immediately before the collision, is sufficient to go to the jury upon the question of negligence.

2. EVIDENCE—*action for negligence—extent to which plaintiff's declarations concerning injury are admissible.* Declarations of pain and suffering are competent only when made as part of the *res gestæ*, or to a physician during treatment, or upon an examination prior thereto to ascertain the nature and extent of the injury and without reference to a contemplated action for damages, unless the examination be made at the instance of the defendant, with a view to the trial.

3. SAME—*when answer of physician to question concerning plaintiff's pain is hearsay evidence.* Where a physician, who had examined the plaintiff in a personal injury case shortly before the trial, is asked whether the plaintiff then suffered pain, his answer, "She tells me she suffers pain," should, on motion, be stricken out as hearsay.

4. SAME—*physician may testify as to his charges for treatment, though plaintiff is a married woman.* The fact that the plaintiff in a personal injury case is a married woman residing with her husband does not render incompetent the testimony of her attending physician as to his charges for treating the injury, as under our statute she might be liable for such charges as well as her husband.

5. APPEALS AND ERRORS—*when failure to strike out improper answer will not work reversal.* Failure to strike out an improper answer of a witness will not work reversal, where, from the uncontradicted

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| 192   | *871 |
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evidence properly in the record, it appears that no different conclusion would have been reached by the jury had the objectionable answer been excluded.

6. SAME—*improper answer, afterward excluded, will not work reversal.* An improper statement of a witness in answer to a proper question, which is afterward stricken out on motion, will not work reversal on the ground that, though excluded, it had a prejudicial effect upon the minds of the jury.

7. DAMAGES—*loss of time and expense of medical attendance—when elements of damage.* The mere fact that the plaintiff in a personal injury case is a married woman residing with her husband does not exclude from the consideration of the jury, as elements of damage, her loss of time and expenses for medical attendance during the continuance of the injury.

*West Chicago Street Railroad Co. v. Carr*, 67 Ill. App. 530, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding.

EGBERT JAMIESON, and JOHN A. ROSE, for appellant.

CRATTY BROS., JARVIS & CLEVELAND, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an action by Marian Carr to recover damages for personal injuries alleged to have been received through the negligence of the defendant, the West Chicago Street Railroad Company, while she was a passenger on one of its cars. The injury is alleged to have been occasioned by the driver negligently permitting the car to come in collision with a wagon. Whether the injury resulted from the negligence of the driver, as charged in the declaration, was the principal issue of fact in controversy before the jury. Upon the trial plaintiff recovered a verdict for \$5700, and entered a *remittitur* for \$1700 of the amount. Judgment was entered for the balance, \$4000, and costs. The defendant appealed to the Appellate Court for the First District, where the judgment below was affirmed.

Three grounds of reversal are here urged: First, the trial court erred in refusing to instruct the jury to find for defendant; second, in admitting improper evidence; and third, in giving a certain instruction to the jury.

The first ground of reversal is based upon the position that there is no evidence in the record tending to establish negligence upon the part of the street car driver at the time of the injury. It was shown by the evidence that a bystander saw the danger of the collision and attempted to warn the driver by calling out to him. The testimony also showed the position of the tracks, the car and the wagon at and immediately before the collision. It is a fair and reasonable inference from this testimony that if the driver had exercised proper care he might have foreseen the danger, as did the bystander, and have avoided the accident by stopping his car. It cannot be said that the evidence, with all its reasonable inferences and intendments, wholly failed to prove the negligence charged, and the peremptory instruction to find for the defendant was therefore properly refused.

It is insisted the court erred in admitting testimony, first, by allowing the plaintiff to testify, in answer to a question, as to the condition of her health before the accident and afterward, the ground of the objection as stated being, that no facts were proved upon which to base her opinion. The question did not call for an opinion, nor did she give any opinion, on the subject of her health. She was asked to state the facts in that regard, which she did. There was nothing improper in the testimony.

A physician was asked to state the result of an examination made by him soon after the injury, and answered, among other things, that she had suffered an abortion. On the motion of counsel for defendant that part of his answer was stricken out, but it is said this did not cure the error, it being urged that the testimony had its prejudicial effect upon the minds of the jury upon the answer being made, and no subsequent exclusion of it could re-

move the injury. Conceding the statement to have been improper, the position of counsel amounts to saying that whenever a witness makes an improper answer to a question the error can only be corrected in the trial court by granting a new trial. But such a contention can scarcely be seriously insisted upon.

The same physician testified that he again examined the plaintiff shortly prior to the trial, but not with a view to testifying upon the trial, and, after describing her condition at that time, her counsel asked him whether she then suffered pain. An objection to the question being overruled, he answered, "She tells me she suffers pain." Counsel for the defendant thereupon moved to strike out the answer, but the motion was overruled. The attempt to justify this ruling is, that under the rule admitting declarations by an injured party to an attending physician the answer was original testimony. It is said by Greenleaf in his work on Evidence, (vol. 1, sec. 102): "Where the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also original evidence. If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence and often the only proof of its existence. \* \* \* So, also, the representation by a sick person of the nature, symptoms and effects of the malady under which he is laboring at the time are received as original evidence. If made to a medical attendant they are of greater weight as evidence, but if made to any other person they are not on that account rejected." The same rule is laid down in 1 Phillips on Evidence, (Edw. ed.) 182.

As will be seen from a note to the text in Greenleaf (5th ed.) there is much confusion, if not an irreconcilable conflict, in the decisions of the courts construing and applying the rule stated. In the State of New York there has been a radical change in the rulings of the Court of Appeals on the subject, resulting from an enactment by

the legislature removing the disability of a party litigant to testify in his own behalf, the reasoning being that the necessity which formerly existed for the admission of declarations of pain and suffering no longer exists to the same extent as before the passage of that act, and it is there now held that evidence of screaming, groaning, etc., being the natural language of pain, is admissible, but that simple declarations of the injured party, not to a physician for the purpose of being attended professionally, but simply making the statements that he or she is then suffering pain, are not competent; and it is held that this ruling can work no hardship in case of the death of the injured party, for the reason that in such case suffering is not an element of damages. This ruling is criticised by the Supreme Court of the State of Indiana in that it makes a departure from the original rule upon the ground that the law of evidence has been changed in that State as to the competency of the party to testify in his own behalf, the Indiana court holding that a rule of evidence, under the common law, could not properly be changed for that reason. Decisions are to be found in many other States following, with more or less strictness, the respective views of these courts. There is uniformity, however, in the decisions upon several of the questions which enter into the proper construction and application of the rule. All agree that the declarations, to be admissible, must be confined to the statement or complaint or exclamation of present existing pain and suffering, and not to the past, nor to the manner and circumstances of receiving the injury; also that, under well recognized general rules of evidence, declarations so immediately connected with the infliction of the injury as to become part of the *res gestæ* are competent, and may be proved by any competent witness who may have heard them; also, that statements of the location of an injury and existing pain, made to a physician during treatment or upon an examination, and for the purpose of ascertaining the extent and nature of

the injury, if made without reference to future litigation, may be properly stated by the physician in giving his opinion of the nature, character and extent of the injury. And some cases hold that, whether the examination is made with a view to testifying upon a trial or not, such statements are competent, the jury being left to consider that fact in giving proper weight to the testimony; and still other cases seem to hold that like declarations are competent they being made to others than physicians, and not being so connected with the injury as to be part of the *res gestæ*.

We think, however, the correct rule to be deduced from that laid down by Greenleaf, and most conducive to justice, is, that such declarations, being in favor of the party making them, are only competent when made as part of the *res gestæ*, or to a physician during treatment, or upon an examination prior to and without reference to the bringing of an action to recover damages for the injury complained of, unless the examination should be made at the instance of the defendant, with a view to the trial. This view is in harmony with what we said in *Illinois Central Railway Co. v. Sutton*, 42 Ill. 438, as follows (p. 441): "A physician, when asked to give his opinion as to the cause of a patient's condition at a particular time, must necessarily, in forming his opinion, be to some extent guided by what the sick person may have told him in detailing his pains and suffering. This is unavoidable, and not only the opinion of the expert, founded in part upon such data, is receivable in evidence, but he may state what his patient said in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of *res gestæ*." See, also, *Collins v. Waters*, 54 Ill. 485.

Exclamations of pain so immediately connected with the injury as to come within the rule making them part of the transaction are competent, because they are the

natural expressions of bodily agony and suffering, and are, in a sense, evidence of acts, expressed in words. It is not so much what the sufferer says, as the fact of giving audible expression to suffering. A groan, a sigh, a scream, or other involuntary audible exhibition of pain, conveys to the mind the same impression as contortion of the features, writhing, struggling or other physical manifestations of agony. Therefore any competent witness to such exclamations or exhibitions of pain and suffering may certainly be allowed to testify to them without injury to the opposing party, and, of course, as part of the *res gestæ*, statements as to the manner of inflicting the injury, the location of the injury and the pain and suffering are also proper to be proved by any competent witness. We think, however, that to carry the rule so far as to permit either physicians or others to testify to declarations made so long after the infliction of the injury as to be no part of the *res gestæ*, not during treatment or attendance upon the injured party, or not upon an examination by a physician for the purpose of determining the nature, character and extent of the injury, would be to afford an opportunity to a party to manufacture evidence in his own behalf, and which, in at least most instances, could not be refuted or overcome. The adoption, broadly, of the rule contended for could only be justified upon the ground of necessity, as against all the general rules as to the competency of testimony, and we think, even in the absence of the statute making parties competent to testify, no such necessity exists. Nor do we think the rule laid down by *Greenleaf*, properly construed, is to be so understood. In this case the plaintiff unquestionably had the right to show, if she could, that she continued to suffer pain up to and during the time of the trial. The question put to the physician was not, therefore, objectionable. But his answer, "She tells me she suffers pain," under no construction of the rule was competent. In the first place, it was not responsive to the



question, and next, it was a mere declaration of the plaintiff in her own favor, confined to no particular time and without any indication as to the circumstances under which it was made. Of course, so far as shown by the facts the answer was no more competent because made by a physician than it would have been if made by any other person. It was hearsay, pure and simple, and we are unable to see upon what ground the ruling of the court in refusing to withdraw it from the jury can be sustained.

It is, however, insisted, and, we are inclined to think, with reason, that notwithstanding this error the judgment below should not be reversed. In the first place, the statement, to a jury of average intelligence, could have but little, if any, weight, being a mere declaration, "She tells me she suffers pain." The testimony, however, to the effect that the injury inflicted upon the plaintiff at the time was of a serious nature is uncontradicted. She was fully corroborated as to the fact that the collision of the car with the wagon crushed her between the seats, and she was taken out of the car and carried to a neighboring drug store in an unconscious condition. She testified, as she was competent to do, that she suffered pain from that time forward. Her physician testified that she suffered an internal injury, which, if it existed, any one could readily see must have produced more or less pain and suffering. In this view of the uncontradicted testimony we cannot bring ourselves to the belief that the improper answer of the witness above mentioned was of such a prejudicial character as that a different result would have followed had it been excluded.

The attending physician was also asked: "Doctor, what is the amount of your bill for your services to Mrs. Carr, as physician, since this accident?" The question was objected to as incompetent and irrelevant. He answered that a reasonable charge would be \$700. The ground of the objection to the question seems to be, that

inasmuch as the plaintiff was, at the time of the injury and during her treatment, a married woman residing with her husband, the latter alone was liable for her medical attendance, and that therefore in this suit the question of the value of such service was unimportant. There can be no question that under our statute removing the disabilities of married women a wife may, by contract express or implied, become liable for medical treatment for herself or even for her husband, so that the question which was asked did not call for an irrelevant answer. It asked for a fact which was proper to be considered, in connection with all the other testimony, in determining whether the wife, by her agreement or conduct, had made herself liable for the amount of the charges made by the physician. But, independently of this fact, section 15 of chapter 68 of our statute (2 Starr & Curtis' Stat. 1896, p. 2133,) makes the expenses of the family a charge upon the property of both husband and wife, or either of them, in favor of creditors therefor, and says in relation thereto they may be sued jointly or separately. It will scarcely be denied that medical attendance upon the family is a family expense, within the meaning of this statute, and we think under that section plaintiff could be held liable and sued separately for the reasonable charges of the physician. No objection was made to the answer.

At the instance of the plaintiff the court instructed the jury, if it found for her, in fixing the damages it should take into consideration all the circumstances concerning the case, so far as shown by the evidence, "the loss of time by the plaintiff, if any, occasioned by the injury, the pain she has suffered, if any, the money she has expended or become liable to expend, if any, in endeavoring to be cured of such injury, the business she was engaged in, if any, at the time she was injured, and the extent and duration of the injury." The principal objection urged to this instruction is the same as that made to the question put to the physician as to the amount of his charges for

treatment of the plaintiff, the contention being, that it was the duty of her husband to support her and pay for her treatment, and that her loss of time, if any, would only be in failing to attend to her household duties, for which he alone could sue. What we have already said will sufficiently dispose of the question as to the physician's charges. There is testimony, not very satisfactory, it is true, that the plaintiff was, prior to her injury, engaged in employment other than the mere performance of her household duties, such as needle-work on flags, and taking in washing. Section 7 of chapter 68 of our statute (Starr & Curtis, p. 2124,) provides: "A married woman may receive, use and possess her own earnings, and sue for the same in her own name, free from the interference of her husband or his creditors." We do not regard the instruction as a model to be followed in like cases, but are unable to see wherein it could have misled the jury to the defendant's prejudice, especially so for the reason that the instructions given at the instance of the defendant were full and explicit to the effect that "every item and element of damage claimed by the plaintiff must be shown by a preponderance of evidence in the case, and every item and element of damage which, in the judgment of the jury, is not sustained by a preponderance of the evidence should be disallowed." Under the plaintiff's instructions the jury were only authorized to allow damages for physician's bills or for loss of time, "if any," shown by the evidence, and in this kind of an action it is impossible to tell whether the jury allowed such items or not, the damages for the injury, pain and suffering being left to the discretion of the jury.

On the whole record we are of the opinion that the judgment of the Appellate Court should be affirmed.

*Judgment affirmed.*

## LOUIS WATERLOO

v.

THE PEOPLE *ex rel.* Anna Schreiber.*Opinion filed December 22, 1897.*

1. BASTARDY—*section 18 of Bastardy act limits complaining witness' right to compromise.* By section 18 of the Bastardy act (Laws of 1889, p. 61,) the right of a complaining witness to release the reputed father of the child from liability is limited to cases where the latter pays not less than \$400, in the absence of written consent by the county judge to settle for a less amount.

2. SAME—*release of defendant by justice—how far State controls action.* No appeal is provided for in the Bastardy act from a judgment of a justice of the peace discharging a defendant, and, since the amendment of 1889, (Laws of 1889, p. 61,) the cause of action is, to a certain extent, controlled by the State.

3. SAME—*discharge of defendant by justice no bar to further proceedings.* The release by a justice of the peace of a defendant charged with bastardy is no bar to another examination before another justice of the peace on the same charge, nor to a trial by the proper court in response to the action of the latter justice in putting the defendant under bonds to appear for trial.

*Waterloo v. People*, 67 Ill. App. 320, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Criminal Court of Cook county; the Hon. ABNER SMITH, Judge, presiding.

J. H. FRENDETHAL, for appellant:

The proceeding in bastardy is a civil and not a criminal proceeding, and is purely statutory. *State v. Braun*, 31 Wis. 600; *Rawlins v. People*, 102 Ill. 475; *Peak v. People*, 71 id. 278; *People v. Noxon*, 40 id. 30; *State v. Evans*, 19 Ind. 92; *Galvin v. State*, 53 id. 51; *McAndrews v. Madison County*, 67 Iowa, 54; *Lee v. People*, 140 Ill. 536.

The general statute authorizing an appeal to the circuit court from the judgment of any justice is applicable to bastardy proceedings, and the people may appeal in

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such cases. *Galvin v. State*, 56 Ind. 51; *Reed v. State*, 66 id. 70; Work's Pr. sec. 1366.

When the defendant is discharged by a justice of the peace the plaintiff's step is to appeal. *State v. Braun*, 31 Wis. 600; *Galvin v. State*, 56 Ind. 51.

A statute is to be construed as changing the common law no further than its express terms declare. *Cadwalader v. Harris*, 76 Ill. 370; *Bank v. McCrear*, 106 id. 281.

A discharge by a justice of the peace of a person accused of bastardy, upon the ground that in his opinion sufficient cause does not appear for believing him guilty, under section 3 of the Bastardy act is a bar to further proceedings against him, under the same provisions of the statute, as the father of the same child. *State v. Braun*, 31 Wis. 600; *Galvin v. State*, 56 Ind. 51.

W. F. STRUCKMAN, for appellee:

Under the law in Illinois, is the complaining witness in a bastardy proceeding limited to one complaint in the justice court, and can she appeal from an adverse decision by the justice? The proceeding in bastardy is a purely statutory proceeding. It is not a suit at common law, neither is it criminal. *Lee v. People*, 140 Ill. 536.

The action is not *ex contractu*, nor does the foundation of the right of recovery bear any resemblance to a penalty. The object is not to punish for immorality or vice, or to impose a penalty for an unlawful act, but to provide a remedy for the enforcement of a legal obligation to support and maintain the bastard child. The procedure relates to the remedy, and not to the cause of action. *Scharf v. People*, 134 Ill. 240.

The money which the reputed father is required to pay for the support, maintenance and education of a bastard child is in no sense a debt, nor does the relation of debtor and creditor exist between the reputed father of a bastard child and the People, who prosecute to compel him to support his illegitimate child. *Rich v. People*, 66 Ill. 513.

A justice, upon a preliminary examination, may bind the defendant to the grand jury for a criminal offense, or discharge him. In neither case does an appeal lie, by either prosecution or defense, to the circuit, county or Superior Court. *Bulson v. People*, 31 Ill. 409; *In re McIntyre*, 5 Gilm. 422.

Mr. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

The relator, Annie Schreiber, made complaint against appellant, Louis Waterloo, under the provisions of the Bastardy act, before Max Eberhardt, a justice of the peace of Cook county, and upon the hearing the justice held sufficient cause was not shown to require appellant to enter into a bond to appear before the Criminal Court of Cook county, and he was discharged. Subsequently the relator made a similar complaint before Walter J. Gibbons, a justice of the peace of Cook county, against appellant, and under this last complaint appellant was required to enter into bond for his appearance before the Criminal Court of Cook county. The case being called for trial in the Criminal Court of Cook county and the evidence on the part of the prosecution heard, appellant offered in evidence the transcript of the case before Justice Max Eberhardt and offered to read the same, to which appellee objected and the objection was sustained, and to which ruling appellant excepted. The appellant was found guilty under conflicting evidence, and a motion to set aside the verdict and grant a new trial being overruled, judgment was rendered requiring the appellant to pay the sum of \$550 and costs, the amount of the judgment payable in installments, as provided by the Bastardy act. To reverse that judgment an appeal was prosecuted to the Appellate Court for the First District, where it was affirmed. An appeal is prosecuted from that judgment of affirmance to this court, the Appellate Court having granted a certificate of importance.

The only question presented by this record is, whether, under the statute in relation to bastardy, where complaint is made before a justice of the peace by an unmarried woman charging the defendant with being the father of her child, and such defendant is brought before the justice for examination as to the truth of the charge and upon hearing is discharged, such a discharge is a bar to a recovery on a hearing in the county court or in the Criminal Court of Cook county, where the same relator had afterward made an affidavit before another justice charging the same defendant with the same offense, and on the second charge and hearing the justice adjudged the defendant should be bound to appear before the court.

The statute concerning bastardy provides that upon complaint being made to a justice of the peace by an unmarried woman, etc., a warrant against the person charged with being the father of the child shall issue, and such reputed father shall be brought before the justice and an examination as to the truth of the charge shall be had, and if he shall be of opinion that sufficient cause appears he shall bind the person accused, in bond with security, to appear at the next term of the county court to be holden in such county to answer such charge, to which court the warrant and bond shall be returned, except that in the county of Cook said warrant and bond shall be returned to the Criminal Court of Cook county; and the court to which such warrant and bond are returned shall cause an issue to be made whether the person charged is the real father of the child or not, which issue shall be tried by a jury.

Whilst it has been held that a proceeding under this statute is, in effect, criminal in form but civil in its nature, yet the complaining witness (the relator) of right might compromise the cause of action. Whilst the right to compromise such cause of action existed in the complainant, the proceeding was of a civil character as between the complainant and the defendant. By an

amendment to the Bastardy act, approved June 3, 1889, and in force July 1, 1889, (Laws of 1889, p. 61,) it was provided: "The mother of a bastard child, before or after its birth, may release the reputed father of such child from all legal liability on account of such bastardy, upon such terms as may be consented to in writing by the judge of the county court of the county in which such mother resides: *Provided*, a release obtained from such mother in consideration of a payment to her of a sum of money less than four hundred dollars (\$400), in the absence of the written consent of the county judge, shall not be a bar to a suit for bastardy against such father," etc. By this provision of the statute the full right of the prosecuting witness to compromise is prevented, and the character of the proceeding, as being criminal in form but civil in nature to the extent of authorizing a compromise to be made, is changed, and the interest of the State is represented by the requirement that no compromise or release shall be made by paying a sum less than \$400. This prevents the suit from being absolutely and solely under the control of the relator or prosecuting witness. The proceeding is thus made more nearly criminal in form than it was before the passage of this act.

No provision is made in the Bastardy act for an appeal by the prosecuting witness from the judgment of a justice of the peace discharging a defendant, and however the rule might have been before the passage of the amendatory act of 1889, since the passage of that act the State controls the cause of action to a certain extent. The adjudication before the justice of the peace is not a finding of guilty or not guilty, but a finding as to whether there is probable cause to hold the defendant to bail for his appearance before a county court or the Criminal Court of Cook county, which courts alone can determine the merits and adjudge the question of the guilt or innocence of the defendant. In this respect, with reference to the question presented before the justice of the peace,



the proceeding is analogous to that of a person charged with a criminal offense, who, on being brought before a magistrate for a preliminary examination, has been there discharged, but who may again be arrested and taken before a different magistrate, and a hearing had on the same subject matter as to whether he should be held to bail. The adjudication of one justice discharging a defendant on a preliminary examination in a criminal case is no bar to an adjudication of another justice requiring him to enter into bail. (*In re McIntyre*, 5 Gilm. 422; *Bulson v. People*, 31 Ill. 409.) Neither is a discharge of a defendant in a bastardy proceeding a bar to another examination or hearing. In this case, the adjudication of Max Eberhardt in discharging the defendant was not a determination of his guilt or innocence, and the action of Justice Gibbons, on the similar complaint made by the prosecuting witness before him, requiring the defendant to enter into bail for his appearance before the Criminal Court of Cook county, was not an adjudication as to his guilt or innocence. That can only be determined by the court before whom the defendant was required to appear by the bond he entered into. The hearing before Justice Max Eberhardt was no bar to a trial before the Criminal Court of Cook county, where the defendant appeared in response to the bond required on the examination before Justice Gibbons.

There was no error in sustaining the objection to the introduction in evidence of the transcript of the case before Max Eberhardt, justice of the peace, and in refusing it to be read to the jury.

The judgment of the Appellate Court for the First District is affirmed.

*Judgment affirmed.*

JENNIE CRONE  
v.  
THOMAS W. CRONE.

*Opinion filed December 22, 1897—Rehearing denied February 3, 1898.*

1. APPEALS AND ERRORS—*when objection of variance is not waived by absence of objection from record.* An objection of variance between the complainant's allegations and proof is not waived by the absence of such objection from the record, where the alleged variance arises from proof made by the defendant upon the hearing.

2. SAME—*variance in proof of immaterial allegation is not ground for reversal.* Variance in proof of an immaterial allegation of the complainant's bill is not ground for reversal.

*Crone v. Crone*, 70 Ill. App. 294, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. ELBRIDGE HANECY, Judge, presiding.

CONSIDER H. WILLETT, for appellant.

GEORGE B. POWER, and ASA QUINCY REYNOLDS, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

In the summer of 1896 Walter S. Crone, the husband of appellant, Jennie Crone, was in the saloon business at No. 6 Dearborn street, Chicago, and on July 6 of that year sold out the saloon and business for \$6000, receiving \$1000 in cash and \$5000 in notes payable to his order. He died one month after the sale, but before his death endorsed and delivered to appellant the promissory notes, and she deposited them with Graham & Sons for collection. After the death of Walter S. Crone, his father, the appellee, Thomas W. Crone, filed the bill in this case against appellant and Graham & Sons, alleging that he was an equal partner in the saloon business with his son, and seeking

to recover his share of said proceeds and also one-half of warehouse certificates in the possession of appellant calling for whisky in bond, of the value of \$400, as partnership property. The Grahams answered disclaiming any interest in the notes and submitting to the order of the court. Appellant answered denying the interest claimed. The cause was heard before the judge in open court, and there was a decree for appellee, which has been affirmed by the Appellate Court.

The complainant and his son, Walter S. Crone, had been in the saloon business at different places in Chicago for more than twenty years, and of late years, at least, had lived together in one family. The business was always conducted in the name of complainant, and his name was over the doors of all the different saloons. All the receipts for supplies, rents and all warehouse certificates were made out in his name. He is now seventy-eight years old, and for the last ten years did not take any very active part in the business, but was frequently about the saloon and was consulted and his wishes deferred to by his son. It is certain that there was never any particular understanding or agreement between them as to their precise relation or interests in the property and business. The evidence on behalf of the complainant was, that he furnished all the means and made the entire investment in the first saloon purchased, and took his son in without any capital whatever, and that no other means were ever put into the business, but that each saloon was bought with the proceeds of the sale of the preceding one. This was denied, and the evidence on that subject is irreconcilable. The witnesses having been examined in open court, much weight is to be given to the finding of the judge, and we cannot say that his conclusion that the alleged partnership existed was wrong.

It is assigned for error that the court allowed complainant to testify to conversations had and business arrangements made with his son and alleged partner, out

of the presence and without the knowledge of his wife, the defendant, Jennie Crone, and which she could not be prepared to contradict. The notes had been given to her by her husband in his lifetime, and she was not claiming them or defending the suit as his heir. The testimony did not come within any of the exceptions which would render it incompetent, and, of course, it did not become so because she was not present when her husband made the contract or arrangement testified to.

The defendant, Jennie Crone, while testifying, told about \$1000 that she was to have given complainant which she never did give him, on certain conditions which were never carried out or complied with, and she was then asked why that \$1000 was to be paid, and the court sustained an objection to the question. The ruling was right. The question was irrelevant to any inquiry in the case. She had also explained that complainant's name was over the door of the saloon on account of an old judgment against her husband, and she was asked if she knew when the judgment was paid. The court sustained an objection to the question, but it was proved by the next witness that the judgment was paid in 1892, so that she had the benefit of the evidence and no injury resulted. The question about the \$1000 was also fully answered by her, and the whole of the unexecuted proposition fully explained in answer to other questions.

The only other point made is, that complainant stated one case in his bill and proved and recovered on a different state of facts. It is a familiar rule that the allegations and proofs in a chancery cause must correspond, and that a complainant cannot allege one ground of relief and recover by proof of another. The proofs corresponded with the allegations in the bill in every particular, except in the averment that when the notes were given to Jennie Crone her husband gave her an absolute property in one-half and complainant was to receive the other one-half of the proceeds, which right of complainant she refused

to recognize. The proof showed that the husband gave the notes to his wife as her absolute property. It is insisted, on the other hand, that this question cannot be raised here because it does not appear, from the record, that it was raised in the circuit court, and the following cases are referred to as sustaining that position: *Thompson v. Hoagland*, 65 Ill. 310 was a case where the note set out in the bill did not contain the words "value received." When the note containing those words was offered in evidence a general objection was made, but the variance was not pointed out. It was, of course, held in this court to be waived, but it was not a question of stating one case by a bill and making another by the proof. In *Meers v. Stevens*, 106 Ill. 549, a contract made by an agent was stated in an answer according to its legal effect as made by the principal, and it was held that there was no variance. The point insisted upon here was not involved. In *McAuliffe v. Reuter*, 166 Ill. 491, the cause was heard in the Superior Court on exceptions to the master's report recommending the decree which was entered. Exceptions to a master's report must point out specifically all grounds of objection which are not conclusions of law from the facts found by him, and as no objection on the ground of variance was raised by such exceptions it was not considered in this court.

In a case of this kind, and where the supposed objection arises from proof made by defendant, there is no place where the defendant is called upon to make, or can make, an objection in the record, and, of course, there can be no waiver because he has not done so. But in this case we think there was no such variance between the allegations and proofs as should call for a reversal. All the material averments affecting the rights of the parties were proved as stated, and the averment in question did not change or affect the rights of the parties in the slightest degree or make a different case for complainant. The material averments were as to complainant's interest in

the notes, the endorsement and delivery to the defendant, Jennie Crone, and her possession and refusal to recognize his rights. These were all proved as averred, and established complainant's case.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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THE TRAVELERS' INSURANCE COMPANY

v.

CLARA P. MAYO.

*Opinion filed December 22, 1897.*

1. MERGER—*when cause of action on mortgage note merges in deficiency decree.* Where the holder of a mortgage note files a bill to foreclose against all parties jointly and severally liable thereon, and obtains a foreclosure decree against them, but takes a deficiency decree, after sale, against one defendant only, no disposition being made of the case as to the others, the cause of action merges in such decree, and the other defendants are released.

2. BILLS AND NOTES—*when failure to take deficiency decree against surety releases him.* One who, though made party defendant to a proceeding to foreclose a mortgage securing a note of which he is a joint maker, is not made defendant in the deficiency decree, will be released, although, as between him and the party held in the decree, his liability on the note was that of a surety.

*Travelers' Ins. Co. v. Mayo*, 70 Ill. App. 627, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding.

ALEXANDER CLARK, for appellant.

GARNSEY & KNOX, for appellee.

Per CURIAM: This is an attachment suit brought by appellant, against appellee, in the circuit court of Will county. There was a judgment for appellee in that court,

and appellant removed the case, by appeal, to the Appellate Court for the Second District. The judgment was affirmed, and the opinion delivered by Mr. Justice LACEY was as follows:

"This was a suit in assumpsit, seeking recovery on a joint and several promissory note given by R. G. Mayo and his wife, the appellee, executed in the State of Florida June 15, 1888, for \$5000, with twelve per cent interest after maturity, and due in two years. The note was payable at the appellant's office at Hartford, Connecticut, with exchange on New York. This suit was commenced in attachment against both signers of the note, and the writ levied on the real estate of appellee. She then filed pleas alleging her coverture, and that by the laws of Florida a married woman was not liable on a promissory note. The suit was dismissed as to R. G. Mayo and additional counts filed, Nos. 5 and 6 attempting to charge appellee as guarantor. The appellee then filed her fourth plea, setting up the execution of the note and mortgage on the real estate in the State of Florida, that the same was foreclosed in the circuit court in Orange county, State of Florida, and a decree of sale of foreclosure entered by said court and the real estate sold for a certain sum bid, leaving a deficiency of \$4891.10, and that judgment was rendered in said court for said deficiency against the said R. G. Mayo alone, although appellee was duly served and said court had jurisdiction of her and the said Mayo, and said judgment was rendered on the said note, being the same cause of action sued on in this case, and claimed that the said note was merged in said judgment, and that the same was a bar to this action against her. The appellant then filed its seventh count, setting up as cause of action the same facts and seeking recovery on the deficiency decree. The court below sustained demurrer to said seventh count and overruled it to the fourth plea. The cause was submitted to the court, the appellant abiding its demurrer to said fourth plea, and the court ren-

dered judgment against appellant and for costs, from which judgment this appeal is taken.

"The errors assigned are, that the court erred in overruling the demurrer of the appellant to the fourth plea and in sustaining the demurrer to the seventh count of the declaration.

"The main and only question to be passed upon by this court is, whether the said deficiency decree rendered by the Florida court against R. G. Mayo alone was an extinguishment of the cause of action against appellee as well as R. G. Mayo. It is not disputed that a judgment or decree against one of two joint principals releases the other, and this rule appears to be fully established and recognized. (*Lawrence v. Beecher*, 116 Ind. 312; 19 N. E. Rep. 143.) The case cited holds that where there is a deficiency decree against one of several makers of a promissory note, and no disposition of the case as to the others is directly made further than to decree that their equity of redemption is barred, the cause of action is barred in a subsequent suit on the note against those not included in the deficiency decree. It would not be the case, however, where there was simply a decree of foreclosure; but a subsequent deficiency decree is in its effect a personal judgment upon the note, and where the court has jurisdiction against all the several makers and only renders judgment against one, this extinguishes his cause of action against the others. The court also further holds, that even where the note was joint and several, and where each might be sued severally, yet where all are sued as joint makers and judgment is taken against one the other makers by this action are released. The case might be different if the court had dismissed the suit against those not sought to be held, in such manner as to make it a several action against each of the makers before final judgment against one. In a case like the Indiana case, where a deficiency judgment was taken against one of several makers of a promissory note, and



no other disposition made by the court as to the others, the cause of action is merged in the judgment, and those against whom no judgment is taken are released.

"The appellant seeks to evade the force of the rule as above correctly announced, as we think, in the case cited, by the fact set out in the fourth plea, that appellee, while she signed the note as a joint maker, was in fact security for Rudolph G. Mayo, her husband, and that, therefore, her husband might be pursued to final judgment or decree without releasing her, though the court had jurisdiction of her person the same as that of her husband. This contention is based on the supposed ground that she was only secondarily liable, and that the principal, especially in equity, should be pursued to insolvency before the liability of the surety should attach, and, therefore, she is not released by the action of the court in the foreclosure and deficiency decree in the Florida case. The fact that appellee was security did not make her any the less liable jointly with the principal, and this was the position she occupied, and any suit at law brought on the note should have been against both jointly, and not against appellee in the capacity of indorser after having pursued the principal to insolvency showing a suit for that purpose to be unavailing, and not as guarantor. She occupied the position of principal and joint maker. It is true she was security, and would be, in law and in equity, so considered in any equitable defense she should make. If no rights of appellee as security had been violated by the payee she had no defense, and must answer as principal. The following cases will illustrate: *Rogers v. School Trustees*, 46 Ill. 428; *Lincoln v. Hinzey*, 51 id. 435.

"The following rule is laid down in *Lawrence v. Beecher*, 116 Ind. *supra*: 'Where a plaintiff voluntarily elects to take a personal judgment against one of a number of defendants severally liable, without in any way preserving his rights against others then equally liable before the court, the presumption is that he is content with the judg-

ment, and that his contentment is due to the fact that he received at the hands of the court all the relief that he was justly entitled to receive. If he desires to prevent this result he must take some steps, as he well may, to counteract this presumption. If he take no such steps, but elects to take a final judgment against one of the defendants and takes only a judgment of foreclosure against the others, he cannot justly complain if this presumption prevails against him, since he must be deemed to have obtained all the relief to which equity and justice entitle him.' The plaintiff should not be allowed 'to disturb the courts and vex the parties with many actions.'

"If appellee were security in this case and the court had full jurisdiction, as it had, of her person and subject matter of the suit and that of the principal, and entered a final deficiency decree, without dismissing the bill against her without prejudice, against the principal, the presumption would be that on account of her securityship, and some violation of her rights by the appellant as such, she was released, or that he voluntarily released her. It may be that if appellant had taken some secondary relief in its decree against appellee, whether rightfully or wrongfully, she would have been bound by it and liable according to its terms. But no such action was taken. The finding of the Florida court was, in effect, in her favor, and by its decree appellant must abide. We can see no substantial difference in appellant's favor, as claimed by its counsel, between this case and the Indiana case above cited.

"Seeing no error in the record the judgment of the court below is affirmed."

We agree with the conclusion of the Appellate Court and the reasons therefor given in the foregoing opinion, and it is adopted as the opinion of this court.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

LEO RASSIEUR

v.

ROBERT E. JENKINS, Assignee.

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*Opinion filed December 22, 1897.*

**VOLUNTARY ASSIGNMENTS**—*claims not due should be presented within three months after assignee's notice.* Under section 10 of the Assignment act, (Laws of 1877, p. 119,) claims, whether due or to become due, must be presented within three months after the giving of the assignee's notice provided for in section 2 of the same act, or they cannot participate in dividends until after the payment of claims duly presented.

*Rassieur v. Jenkins*, 64 Ill. App. 336, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the County Court of Cook county; the HON. ORRIN N. CARTER, Judge, presiding.

The Consolidated Ice Machine Company, a corporation, made an assignment for the benefit of creditors to Robert Jenkins, on October 14, 1890. The assignee gave notice to creditors to present claims against the insolvent estate in pursuance of the statute, which notice was published in 1892. The appellant, claiming to be liable on account of having signed certain bonds as security for the insolvent corporation, which bonds provided for the protection of certain parties against suits for infringement of letters patent, and from any damages that might result from suits which might arise on account of using ice machines manufactured by the insolvent ice machine company or corporation, presented a claim to the assignee on April 22, 1895, which claim was filed by the assignee in the county court of Cook county on September 18, 1895. On the presentation of such claim the county court of Cook county entered an order refusing to allow the same until all claims against the insolvent corporation which had been presented within three months after the pub-

lication by the assignee of the notice to present claims against the estate were paid in full, and also denying the petition of appellant to stay any dividend of such creditors until the further order of the court. At the same time said order was so entered by the county court, the assignee filed his report and account therein, showing a balance of cash on hand amounting to \$57,209.98, with outstanding accounts estimated to be worth \$10,000. The claim of appellant was a contingent claim, which he asserted he believed would amount to the sum of \$50,000 by reason of his being such surety on said bonds. From the order disallowing the claim and denying the right to participate in any dividends from said insolvent estate until all claims presented and filed within three months after the publication of notice to creditors was made by the assignee, and denying the petition to stay any dividends until further order of court, the petitioning creditor appealed to the Appellate Court, where there was an affirmation, and this appeal is prosecuted.

JOHN H. HILL, for appellant.

OTIS & GRAVES, for appellee.

Mr. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

By section 2 of the act in reference to voluntary assignments (Hurd's Stat. p. 159,) it is provided: "The assignee or assignees named in such assignment shall forthwith give notice thereof by publication in some newspaper published in the county, \* \* \* and shall also forthwith send a notice thereof by mail to each creditor of whom he or they shall be informed, \* \* \* notifying the creditors to present their claims, under oath or affirmation, to him within three months thereafter." By section 10 of the same statute it is provided: "Any creditor may claim debts to become due as well as debts due, but on debts not due a reasonable abatement shall be

made when the same are not drawing interest; and all creditors who shall not exhibit his, her or their claim within the term of three months from the publication of notice, as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term and allowed by the county court." The latter section expressly provides for allowance of debts to become due as well as debts due, and is susceptible of no other construction than that claims not presented within three months cannot participate in the dividends until after the payment in full of all claims presented to and allowed by the county court within that time.

The language of the above statute, as well as its spirit, is similar to that of sections 60, 67 and 70 of the statute in relation to the administration of estates of deceased persons. (Hurd's Stat. p. 115.) By section 60 of that act it is provided that "every administrator or executor shall fix upon a term of the court, within six months from the time of his being qualified as such administrator or executor, for the adjustment of all claims against such decedent, and shall publish a notice thereof," etc. By section 70 of the same act it is provided that demands against the estates of decedents shall be classified, and by the seventh clause of the latter section it is declared with reference to the allowance of claims, that "all other debts and demands of whatever kind, without regard to quality or dignity, which shall be exhibited to the court within two years from the granting of letters as aforesaid, and all demands not exhibited within two years as aforesaid, shall be forever barred, unless the creditors shall find other estate of the deceased not inventoried or accounted for by the executor or administrator, in which case their claims shall be paid *pro rata* out of such subsequently discovered estate." By section 67 of the same act it is provided that "any creditor whose debt or claim against the estate is not due may nevertheless present the same for allowance and settlement, and shall there-

upon be considered as a creditor under this act, and shall receive a dividend," etc.

By the provisions of section 67 of the act in relation to the administration of estates, debts to become due are to be allowed and are to participate in the dividends of the estate as inventoried, in the same way and to the same extent as provided by section 10 of the act in relation to voluntary assignments for the benefit of creditors. The provision of the act in relation to the administration of estates by which claims not presented within two years were not permitted to participate in the dividends of inventoried property theretofore made, was, before this court in *Stone v. Clark's Admrs.* 40 Ill. 411, where letters of administration were granted on the 18th day of January, 1860, and the administrator was summoned to defend against a claim filed by Stone on the 4th day of March, 1862. The claim was based on the indemnifying bond made by Clark, and no damage resulted to Strong until after letters of administration were granted; and in that case it was held that the claim, not having been presented within two years from the granting of letters of administration, was barred except as to future discovered assets. That case was followed by *Snydacker v. Swan Land and Cattle Co.* 154 Ill. 220, where a claim was sought to be recovered after the lapse of two years from the time of the publication of notice to present claims and of the appointment of the administrator, and in the latter case it was held that by the express terms of the statute claims not filed against an estate and exhibited to the court within two years were barred as to any dividends, except as to subsequently discovered assets not inventoried or accounted for.

The claim in *Stone v. Clark's Admrs.* 40 Ill. 411, was a contingent claim, dependent upon an event happening more than two years after the appointment of the administrator and the notice to present claims, and in this respect is similar to the case now under consideration, where

the claim is presented as a contingent claim dependent on events to happen after its presentation, by which the appellant might sustain a loss, as set forth in his claim, amounting to \$50,000. The language of the sections of these two statutes with reference to the presentation of claims for debts, whether due or not, is so alike that a construction given to one must be given to the other, and the language of section 10 of the act in relation to assignments for the benefit of creditors is susceptible of no other construction than that claims which are not presented within three months from the publication of notice by the assignee should not participate in dividends until after payment in full of all claims presented within that time.

It is insisted that the case of *Suppiger v. Gruaz*, 137 Ill. 221, is in conflict with the view herein announced. That case was considered in *Snydacker v. Swan Land and Cattle Co. supra*, and to the extent it was in conflict with what was declared in *Stone v. Clark's Admrs. supra*, was disapproved. We hold, therefore, that claims against an estate which has been assigned for the benefit of creditors, whether due or to become due, must be presented within three months of the time of publication of notice, as provided for in that act, or the same cannot participate in dividends until after the payment of all claims presented within that time and allowed by the court. If a different rule should be applied, then in contingent claims like this, where years might elapse before the amount of the claim was determined as against the creditor, to allow petitions to stay dividends would render the settlement of insolvent estates the work of years, instead of being determined with dispatch, as was the evident intent of the act.

The court did not err in refusing to grant the prayer of the petition, nor in refusing to allow appellant's claim until after the payment of all claims which had been presented within three months from the time of publication of notice. The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## THE WEST CHICAGO STREET RAILROAD COMPANY

v.

MARY KENNELLY.

*Opinion filed December 22, 1897.*

1. EVIDENCE—*action for negligence—what is admissible as tending to show plaintiff's previous physical condition.* While the physical condition of the plaintiff prior to her injury cannot be proved by her declarations made to her acquaintances, yet it is not error to permit a witness who had visited the plaintiff almost daily for several months prior to the injury, to state the fact that she had not heard the plaintiff complain of any sickness.

2. SAME—*proof of plaintiff's condition after injury—what not erroneous admission of testimony.* Where a witness, in an action for negligence, who had visited the plaintiff the day after the injury, is asked how she found the plaintiff at that time, the admission in evidence of her answer that "she was complaining awful bad" is not erroneous, as such a statement cannot be regarded as proof of a declaration by the plaintiff concerning her condition.

3. SAME—*statements of pain, not made to physician, inadmissible if not part of res gestæ.* Statements of pain and suffering, past or present, when not made to a physician or medical expert to enable him to form an opinion of the injury, with a view to treatment or other legitimate purpose, are inadmissible, unless part of the *res gestæ*.

4. SAME—*when evidence is incompetent, as being a mere declaration of plaintiff concerning her condition.* Where a witness who visited the plaintiff the day after her injury is asked where the plaintiff complained of pain, her answer that "she complained of her side and under her spine, in the back and this ankle; she screamed with the ankle awfully," is incompetent, as being a mere declaration by the plaintiff concerning her condition.

5. SAME—*proof of manner of injury—what competent as part of res gestæ.* In getting before the jury in a personal injury case how and in what manner the plaintiff was injured, it is competent to show, as part of the *res gestæ*, all that occurred, although in so doing it may appear that other persons than the plaintiff were injured.

6. APPEALS AND ERRORS—*when an erroneous admission of evidence will not reverse.* The erroneous admission in evidence, in an action for negligence, of the declarations of the plaintiff made to an acquaintance, after the injury, concerning her pain and suffering, will not work reversal where the same evidence had already been given by a physician, to whom the declarations were also made.

*West Chicago Street R. R. Co. v. Kennelly*, 68 Ill. App. 244, affirmed.



APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. EDMUND W. BURKE, Judge, presiding.

EGBERT JAMIESON, JOHN A. ROSE, and D. W. MUNN,  
for appellant.

WING, CHADBOURNE & LEACH, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an action brought by Mary Kennelly to recover damages for a personal injury alleged to have been sustained by reason of the negligence of the West Chicago Street Railroad Company. The declaration, which contained one count, alleged that on the 19th day of May, 1894, the plaintiff became a passenger upon one of the defendant's cars which ran through a certain tunnel under the Chicago river, commonly known as the Van Buren street tunnel; that the defendant negligently permitted the train upon which the plaintiff was a passenger to run rapidly down the incline in said tunnel, and then caused the train to be suddenly and violently stopped, in consequence of which the plaintiff was thrown with great force and violence against one of the seats of the car, thereby causing the injury complained of in this case. On the trial the jury returned a verdict in favor of the plaintiff and assessed her damages in the sum of \$2000. The court entered judgment on the verdict, and the defendant appealed to the Appellate Court for the First District, where the judgment was affirmed, and it now brings the record to this court for review.

It was claimed on the trial that as a result of the accident plaintiff received an injury on one of her hips and her right ankle was badly sprained. On the other hand, it was claimed on the part of the defendant that the injuries arose, in a great measure, from other causes, and

in support of this view evidence was introduced tending to prove that in August, 1890, the plaintiff fell through a defective sidewalk and sprained her ankle, and that she brought suit against the city and received in settlement of the case \$315. Evidence was also introduced tending to prove that in the summer before the accident complained of, plaintiff was assaulted on the street by a man who, she said, "had a grudge against me on account of a piece of property." In this assault she was knocked down and seriously injured. Whether the injuries complained of grew out of the accident on the street car, or arose from other causes, as claimed by the defendant, was a question of fact for the jury and the Appellate Court. But that question is not involved on this appeal, and hence it will not be considered.

No fault is found with the ruling of the court on instructions. Indeed, but one question has been presented for our consideration, and that is in reference to the ruling of the trial court on the admission of evidence.

The witness Joran, who was on the car when the accident occurred, speaking of the accident, said: "I went off my feet, of course. As the car ran down the speed increased, and it came all of a sudden to a dead stop, and, of course, knocked everybody down in the car." Defendant's counsel moved to strike out these remarks, but the motion was overruled and exception taken. The objection made to this testimony is, that it was incompetent to show how the accident affected passengers on the car other than the plaintiff. The question before the jury was how or in what manner the plaintiff was injured, but we think it was competent, as a part of the *res gestæ*, to show all that occurred, although in doing so it might appear that others were also injured. The injuries to others were a part and parcel of the same injury received by the plaintiff, and in describing the manner in which she was injured, the injuries received by the others being so closely connected, it would be almost impossible in an

intelligent manner to give an account of one injury without at the same time disclosing the others.

For the purpose, it may be presumed, of showing that plaintiff was in good health before the accident, the witness Davanne was asked, "Did you hear her complain of any sickness?" To the question the witness answered, "No, sir; I did not." While it may be conceded that the declarations of the plaintiff made to the witness were not competent evidence to prove plaintiff's physical condition, yet we are inclined to the opinion that it was not error to allow the witness to state the fact that she heard no complaint. The witness resided near the plaintiff and visited her almost daily for three or four months before the accident, and the fact that during that time she heard no complaint from the plaintiff in regard to her condition may be regarded at least as slight evidence tending to prove her condition. The weight, however, to be given to such evidence was for the jury.

The same witness was asked how she found the plaintiff on the morning after the accident, to which she replied, "She was complaining awful bad." It is said in the argument "that the plaintiff could not make testimony for herself by stating her feelings to a lay witness; that what she may have told the witness was entirely incompetent to be by her repeated as evidence." Conceding that statements made by the plaintiff to the witness in regard to her condition were incompetent, it does not follow that the answer to the question was erroneous. The witness was not asked to give any declarations made by the plaintiff as to her then condition, nor did the witness state what the plaintiff had said to her. It was, no doubt, proper to show whether the plaintiff was quite free from pain and resting easy, or, on the contrary, that she was restless and complaining, and proof of the fact that plaintiff was complaining cannot be regarded as proof of her declarations. It was a mere exclamation, which was proper to be proven.

The same witness was asked the following question: "Where would she complain of pain at the time, after she was hurt?" to which the witness, over the objection of the defendant, answered: "She complained of her side and under the spine, in the back and this ankle. She screamed with the ankle awfully." We do not think this evidence was competent. It was a mere declaration of the plaintiff not made to a physician or expert, and can only be regarded as hearsay. Statements of pain and suffering, past or present, when not made to a physician or medical expert for the purpose of enabling him to form an opinion with a view to treatment or other legitimate purpose, unless made at the time of the injury, so as to constitute a part of the *res gestæ*, are inadmissible. The rule, however, is different where statements have been made to a physician called upon to treat a person who may have received an injury. As was properly said in *Illinois Central Railway Co. v. Sutton*, 42 Ill. 438 (on p. 441): "A physician, when asked to give his opinion as to the cause of the patient's condition at a particular time, must necessarily, in forming his opinion, be to some extent guided by what the sick person may have told him in detailing his pains and sufferings. This is unavoidable, and not only the opinion of the expert, founded in part upon such data, is receivable in evidence, but he may state what his patient said in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of *res gestæ*." The same rule is declared in *Quaife v. Chicago and Northwestern Railroad Co.* 48 Wis. 524, *Barber v. Merriman*, 11 Allen, 322, and *West Chicago Street Railroad Co. v. Carr*, (*ante*, p. 478.)

But while this evidence was incompetent we do not regard its admission sufficient ground for reversing the judgment. Upon looking into the record it will be found that the same witness whose testimony is objected to was present when the plaintiff was examined by the phy-

sician on the day she was injured, and heard the same statement made by the plaintiff, and these statements were testified to by the witness in her evidence. The physician also testified to the same thing without objection. Therefore, being properly before the jury, if the court had excluded the evidence objected to, nothing would have been gained. The error was therefore one which did no harm, and hence is no ground for reversing the judgment.

No other question which calls for a consideration has been raised in the argument.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## THE POSTAL TELEGRAPH-CABLE COMPANY

v.

HENRY A. EATON.

*Opinion filed December 22, 1897.*

1. HIGHWAYS—*abutting owner retains right to the soil subject only to public easement.* The owner of the land over which a public highway is laid out has the exclusive right to the soil, subject only to the right of travel in the public, and the incidental right of keeping the highway in proper repair for public use.

2. SAME—*construction of telegraph line along highway constitutes an additional burden.* The construction of a telegraph line along a public highway constitutes an additional burden upon the fee, for which the owner of the fee is entitled to compensation.

3. SAME—*consent of county board to construction of telegraph line on highway is not binding on owner of fee.* The consent of a county board to the construction of a telegraph line along a public highway does not bind the owner of the fee in such highway, nor deprive him of his right to compensation.

4. EJECTMENT—*owner of the fee in highway may maintain ejectment.* The owner of the fee in a public highway may maintain ejectment against a telegraph company which has constructed its telegraph line along the highway with the consent of the county board but without obtaining the right of way from the owner of the fee, by his consent or by condemnation proceedings.

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| 170   | 513  |
| 78a   | 375  |
| 170   | 513  |
| 104a  | 1116 |
| e104a | 522  |
| 170   | 513  |
| 208   | 1125 |
| e208  | 248  |

5. SAME—*right to bring ejectment against trespasser passes to owner's grantee.* A telegraph company which has constructed its telegraph line along a public highway without obtaining the right of way by consent of the owner of the fee or by condemnation proceedings is a trespasser, and the right of the owner of the fee to bring ejectment against such telegraph company passes to his grantee.

APPEAL from the Circuit Court of Madison county; the Hon. B. R. BURROUGHS, Judge, presiding.

WILLIAM P. BRADSHAW, LOESCH BROS. & HOWELL, and FRANK J. LOESCH, for appellant.

TRAVOUS & WARNOCK, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was an action of ejectment brought by Henry A. Eaton, appellee, against the Postal Telegraph-Cable Company, for the purpose of compelling the removal of the defendant's line of telegraph poles from a public highway known as the Edwardsville and Hillsboro road, which was located over and upon appellee's land.

It appears from the record that the Board of Trade Telegraph Company in 1852 constructed its telegraph line over a public highway known as the Edwardsville and Hillsboro road by the consent of the board of supervisors of Madison county, under a resolution of the board adopted at a regular meeting upon the request of the telegraph company. The resolution granting the right contained the following conditions: "Said line shall start at or near New Douglas and run in a south-west direction, and terminate at or near Venice, in said county, the poles to be set not over two and one-half feet from the margin of the road, not to interfere with ditches and water drains; poles to be eighteen feet high and well set and braced, and the wire to be kept tight, and they are to establish but one line, and by them securing the right of way in the several townships." The telegraph company went on and constructed its line under this resolution

of the board of supervisors, without, however, obtaining consent or right of way from the land owners along the highway. The Board of Trade Telegraph Company operated its line until 1886, when the line was leased to appellant, the Postal Telegraph-Cable Company, and that company has continued to operate the line since that time under its lease.

It is not denied that a telegraph company organized under the laws of this State may, under our Eminent Domain act, acquire property upon which it may erect its telegraph line. Indeed, section 2 of the act relating to telegraph companies (Rev. Stat. 1874, p. 1052,) makes provision for such companies to acquire property, as follows: "Every such company may enter upon any lands for the purpose of making surveys and examinations with a view to the erection of any telegraph line, and take and damage private property for the erection and maintenance of such lines, and may, subject to the provisions contained in this act, construct lines of telegraph along and upon any railroad, road, highway, street or alley, along or across any of the waters or lands within this State, and may erect poles, posts, piers or abutments for supporting the insulators, wires and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad, highway, street or alley, or interrupt the navigation of such waters." Section 4 of the same act provides: "No such company shall have the right to erect any poles, posts, piers, abutments, wires or other fixtures of their lines along or upon any road, highway or public ground outside the corporate limits of a city, town or village without the consent of the county board of the county in which such road, highway or public ground is situated, nor upon any street, alley or other highway or public ground within any incorporated city, town or village without the consent of the corporate authorities of such city, town or village."

It is contended in the argument that the county board having given consent to occupy the highway, and the consent having been acted upon, the owner of the fee of the highway cannot maintain an action of ejectment. Where a highway is laid out over lands outside of an incorporated city, town or village, the public acquires only an easement of passage over the lands, with the rights and incidents thereto, while the owner of the land over which the road is laid out retains the fee and ownership of everything connected with the soil, for all purposes not incompatible with the right of the public to a free and unobstructed use of the road as a public highway. (*Town of Palatine v. Kreuger*, 121 Ill. 72.) Elliott, in his work on Roads and Streets, (p. 519,) in the discussion of the question says: "The abutter has the exclusive right to the soil, subject only to the easement of the right of passage in the public and the incidental right of properly fitting the way for use. Subject only to the public easement, he has all the usual rights and remedies of the owner of the freehold. He may sink a drain under the road, \* \* \* he may mine under it. The herbage and trees growing thereon belong to him." At pages 535 and 536 the author says: "He may maintain trespass against one who unlawfully cuts and carries away the grass, trees or herbage, and even against one who stands upon the sidewalk in front of his premises and uses abusive language against him, refusing to depart. He may also maintain ejectment against a railroad company which has placed its track upon his side of the street without paying or tendering damages therefor, or against an individual who has wrongfully and unlawfully encroached thereon." In *Cole v. Drew*, 44 Vt. 49, in considering the question the court said: "The owner of the soil over which a highway is located is entitled \* \* \* to the entire use of the land, except the right which the public have to use the land and materials thereon for the purposes of building and maintaining a highway suitable for



the safe passage of travelers. This doctrine has been long established."

Other cases holding the same doctrine might be cited, but the rule that the owner of the land upon which a public highway is laid out has the exclusive right to the soil, subject to the easement of the right of travel in the public, and the incidental right of keeping the highway in proper repair for the use of the public, is so well established that the citation of other authorities is not deemed necessary.

If, then, appellee was the owner of the fee subject to the easement, as we have seen he was, has he the right to maintain ejectment? In *Smith v. Chicago, Alton and St. Louis Railroad Co.* 67 Ill. 191, it was held that ejectment would lie against a railroad corporation by the owner of the fee, for land taken and used by it for the purposes of its road, where the land had not been condemned under proceedings instituted for that purpose in the mode prescribed by law. If an action of ejectment may be maintained against a railroad company by the owner of the fee where land has been taken by the railroad company without instituting proceedings to condemn, upon the same ground no reason occurs to us which would prevent the owner of the fee from maintaining an action of ejectment where possession has been taken by a telegraph company. Indeed, the two cases stand upon the same ground, and if a recovery may be had in the one case a recovery may also be had in the other.

The question whether the owner of the fee of a highway may bring ejectment has arisen in other States, and it has been expressly held that the action will lie. In *T. H. & S. Ry. Co. v. Rodel*, 46 Am. Rep. 166, in the discussion of the question the court said: "The doctrine that the owner of the fee may maintain ejectment for the land covered by a public highway is as old, at least, as *Goodtitle v. Alker*, 1 Burr. 133. Lord Mansfield there said: 'I see no ground why the owner of the soil may not bring

ejectment as well as trespass. \* \* \* 'Tis true, he must recover the land subject to the way; but surely he ought to have a specific remedy to recover the land itself, notwithstanding its being subject to an easement upon it.'” The court again says, on page 167: “We have no doubt at all as to the right of the owner of the fee to maintain ejectment against a wrongdoer, although the fee is burdened by a public easement. Our own cases, as we have shown, so declare, and so do all the well considered cases.” See, also, *Carpenter v. O. & S. R. R. Co.* 24 N. Y. 655, and *Robert v. Sadler*, 104 id. 229.

In *Indianapolis, Bloomington and Western Railroad Co. v. Hartley*, 67 Ill. 439, it was held that where the public have acquired an easement over a person's land for an ordinary street or highway, the location of the track of a railroad on the same is an additional burden and servitude upon the land, which will entitle the owner to additional compensation; that such an act is an exclusive appropriation by the railroad company of the soil to its own use which the owner had the right himself to use for any purpose not inconsistent with the public easement, and that hence it is taking private property for public use, which cannot be done without making just compensation.

In *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, an action of trespass was brought by an owner of land abutting on a highway, to recover damages alleged to have been sustained by the erection of a telegraph line on the highway, and the court held that the construction and maintenance of a telegraph line upon the highway was a new and additional burden on the fee, to which it was not contemplated it should be subjected when the road was laid out, and that the owner of the fee was entitled to recover additional compensation for such use; that if the construction of the telegraph line was an additional burden on the fee, as the fee belonged to the appellee that burden could not be imposed upon the land unless compensation was made as provided by law.

The appellee here was the owner of the fee, subject to the easment of the public to use the land for a public highway. He had been compensated for this public use, and could make no objection to the right of the public to use the land for a public highway, but no additional burden could be imposed upon the fee without compensation. When appellant, therefore, entered upon and took possession of the land and erected its line without instituting proceedings to condemn, as required by law, it was a trespasser, and no reason appears why appellee might not sue in trespass and recover such damages as he had sustained, or bring ejectment and regain his property in the condition it was in when appellant entered upon it.

But it is said the telegraph company obtained the right to construct its line from the county board of Madison county, and the authority of the county officers to grant a license of this character cannot be questioned in a proceeding of this kind. The consent of the county board of Madison county that the line might be erected on the public highway would no doubt be binding on the county and the road authorities in the several towns through which the highway runs upon which the line was authorized to be constructed, but the county board could give no consent which would be binding on any owner of the fee in the highway where the line was constructed. The right of the owner of the fee was beyond the control of the county board. His right is predicated on that provision of the constitution which declares that "private property shall not be taken or damaged without just compensation." The legislature had no authority to confer power on the county board to authorize the appellant company to take appellee's land without compensation, and hence the county board was powerless to give such authority. But it will not be necessary to consider this question further, as it was settled against appellant in *Board of Trade Tel. Co. v. Barnett*, *supra*, as will be found upon an examination of that case.

It is, however, said that appellee purchased the land after the telegraph line was constructed, with full notice that the line had been constructed, and hence he took the land with the burden upon it. It is no doubt true that appellee purchased the land subject to all rights appellant possessed in it; but the trouble with appellant is, by taking possession without making compensation to the owner of the fee it acquired no rights as against such owner, and when appellee purchased he acquired all the rights in the land possessed by his grantor, and if his grantor was entitled to bring ejectment this right passed to appellee. Whether appellee could maintain trespass, or whether he would be barred by the Statute of Limitations had such an action been brought, is a question not presented by this record. The sole question here is the right of appellee to maintain ejectment. The circuit court held that he had that right, and we think the judgment correct, and it will be affirmed.

*Judgment affirmed.*

## THE CHICAGO AND ALTON RAILROAD COMPANY

v.

PATRICK MARONEY.

*Opinion filed December 22, 1897.*

1. MASTER AND SERVANT—*master should provide servant with suitable place and appliances for his work.* It is the duty of the master to provide his servants with suitable and reasonably safe places and appliances in and with which to work.

2. SAME—*scaffold for brick masons is a "place" or "appliance" for performing work.* A scaffold to be used by brick masons in erecting a round-house is such a "place" or "appliance" as must be furnished by the master.

3. SAME—*duty of providing safe place or appliance cannot be delegated.* The duty of the master to provide his servants with reasonably safe places and appliances in and with which to work is a positive obligation, and cannot be delegated by the master so as to relieve him from liability for defects.

170 520  
85a 346

170 520  
98a 1215  
a98a 217  
f98a 218

170 520  
192 829  
98a 1592

170 520  
102a 147

170 520  
108a 480

170 520  
e208 837  
e208 838  
208 840

170 520  
111a 52

170 520  
115a 1542

4. *SAME*—servant may assume that master has provided a reasonably safe place to work. In the absence of actual knowledge to the contrary a servant may assume that his master has discharged his duty in providing a reasonably safe place and appliances in and with which to work.

5. *SAME*—when servant need not prove master's knowledge of defects. A servant suing the master for damages for injuries received by the falling of a scaffold need not prove the master's knowledge of the defect, where such defect is not a latent one, which arose after the construction of the scaffold, but is one which arose from the neglect of other servants of the master to put in place certain braces or foot-locks which had been provided, and which were necessary to strengthen and support the scaffold.

6. *SAME*—when master cannot avail of defense of "fellow-servants" in suit for damages. A master sued by his servant for damages for injuries received by the falling of a defective scaffold cannot avail himself of the defense that the scaffold was built by other servants of the master claimed to be fellow-servants with the plaintiff, as the master is liable for failure to provide a reasonably safe place to work, whether he undertakes the performance of that duty personally or through other servants.

7. *INSTRUCTIONS*—each instruction need not embrace every ground of liability averred in different counts. A plaintiff in an action for negligence need not embrace in each instruction every ground of liability averred in the different counts of the declaration, but may frame an instruction for each charge of negligence averred.

8. *SAME*—instruction invading province of jury must be refused. An instruction is properly refused which invades the province of the jury by attempting to decide a question of fact for them.

*Chicago & Alton Railroad Co. v. Maroney*, 67 Ill. App. 618, affirmed.

**APPEAL** from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. ARTHUR H. CHETLAIN, Judge, presiding.

This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment in the sum of \$2500, entered in the Superior Court of Cook county in an action on the case brought by the appellee against the appellant company.

The declaration charged the appellee was engaged by the appellant company to work at his occupation as a brick mason in the construction of a round-house in the

city of Chicago, and that the scaffold prepared by the appellant company for the use of the appellee and other masons gave way and precipitated them to the ground, a distance of twenty feet or more, whereby appellee received serious personal injuries. The first count of the declaration charged that servants of the appellant company, not fellow-servants of the appellee, so negligently and improperly built and constructed the scaffold that it was insufficient to support the weight of the workmen. The second count preferred the same charge of negligence, and specifically charged that the scaffold was built of poor, unsubstantial and defective boards and timbers and was not properly supported by braces or stays. The third count charged that the appellant company negligently caused the scaffold to be overloaded with workmen. The plea was, not guilty, and a trial before the court and jury resulted in a verdict and judgment in favor of appellee in the sum of \$2500.

JAMES H. TELLER, for appellant.

WILLARD GENTLEMAN, and EDWIN W. SIMS, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The errors assigned in this court are, that the trial court erred, first, in denying the motion of the appellant company, entered at the close of all the testimony, to peremptorily direct a verdict in its favor; and second, the court erred in its rulings in giving instructions for the appellee and in refusing certain instructions asked by the appellant company.

Counsel for appellant insists the appellee, in order to recover, was required to establish three propositions, *i. e.*, (a) that the scaffold was defective; (b) the appellant company had notice thereof or was chargeable with notice; and (c) the appellee did not know of the alleged defect and had not equal means with the master of knowing. It

is urged there was no evidence tending to establish either the second or third proposition, and hence it is argued the court erred in refusing to direct a verdict in favor of the appellant company.

It will be observed the position taken by counsel for appellant ignores the charge of the third count of the declaration. We find that charge was not referred to in any instruction asked by either of the parties, and it is therefore apparent the only issues which the evidence, in the opinion of the parties, justified them in presenting to the jury were those arising under the first and second counts of the declaration. We may therefore assume the appellant is warranted in ignoring in this court the charge of negligence preferred in the third count. We may, then, confine our attention, upon this branch of the case, to the pertinency of the three propositions advanced by counsel for appellant.

The evidence abundantly tended to establish the first of these—that the scaffold was defective. Two witnesses, at least, testified that certain foot-locks and braces intended to be used in the construction of the scaffold, and necessary to properly strengthen it, were not used, but were thrown up on the floor of the scaffold. The section of scaffolding which fell was put up on Saturday afternoon, and the evidence tended to show it was not used on that day. It gave way within a few minutes after the appellee and other workmen went upon it on the following Monday morning.

We do not assent that it was requisite to a recovery it should have been proven that appellant had notice, or was chargeable with notice, the scaffold was unsafe or defective, as urged in the second proposition, or that appellee did not know, or had not equal opportunity with appellant of knowing, the scaffold was unsafe or insufficient, as urged in the third proposition. It was the duty of appellant to provide appellee a suitable and safe place and appliances in and with which to work. (*Chicago Drop*

*Forge and Foundry Co. v. Van Dam*, 149 Ill. 337; *Mobile and Ohio Railroad Co. v. Godfrey*, 155 id. 78; *Hess v. Rosenthal*, 160 id. 621; *Cooley on Torts*, 561.) In this instance the scaffold was such place or appliance which the appellant company was required to provide. It undertook to construct it, and the defect was in its construction. The fault was not latent in character, but, as the evidence tended to show, was the result of the negligent failure of employees of the appellant company to place in position certain foot-locks or braces necessary to support and strengthen the scaffold, which foot-locks and braces had been supplied to be used for that purpose. If the scaffold had been properly constructed and had become unsafe by reason of a defect subsequently arising, the doctrine that the liability of the appellant company depended upon notice of such subsequent defect might have had application, but not so when the defect occurs by reason of the failure of the appellant company to discharge the duty cast upon it by law of providing a safe place for the appellee to work. If it omitted its duty in this regard, no rule of law required it should be notified of its own failure before it should be deemed answerable for injuries resulting from such failure.

Nor is the third proposition, that it should affirmatively appear the appellee did not know of the defect, or had not equal means of knowing, etc., applicable in such state of case. The appellee had a right to assume the appellant company had discharged its duty, (*Monmouth Mining and Manf. Co. v. Erling*, 148 Ill. 521,) and to act upon such assumption, in the absence of actual knowledge to the contrary. *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100; *Chicago and Eastern Illinois Railroad Co. v. Hines*, 132 id. 161; *Pullman Palace Car Co. v. Laack*, 143 id. 242; *Pennsylvania Coal Co. v. Kelly*, 156 id. 9; *Wharton on Negligence*, 211; *Bishop on Non-contract Law*, secs. 647, 648.

It is, however, insisted, the workmen employed by the appellant company to construct the scaffolding, and the



appellee, were fellow-servants, and that appellee cannot recover if he was injured by the negligence of a fellow-servant. The relation of fellow-servant, if it existed, can not avail to relieve the appellant company of liability. The duty of the master to furnish safe means, places and instrumentalities for the servant's use is, we declared in *Hess v. Rosenthal*, *supra*, (p. 628,) "a positive obligation towards the servant, and the master is responsible for any failure to discharge that duty, whether he undertakes its performance personally or through another servant. The master cannot divest himself of such duty, and he is responsible, as for his own personal negligence, for a want of proper caution on the part of his agent." And in *Chicago, Burlington and Quincy Railroad Co. v. Avery*, 109 Ill. 314, we said (p. 322): "The master's own duty to the servant is always to be performed. The neglect of that duty is not a peril which the servant assumes, and where the performance of that duty is devolved upon a fellow-servant the master's liability in respect thereof still remains. Care in the supplying of safe instrumentalities in the doing of the work undertaken is the duty of the master to the servant, hence the rule of non-liability on the part of an employer for the negligence of a fellow-servant has no application in this case, where the negligence in question is the master's neglect of duty in the providing of safe appliances."

We find no error in the ruling of the court upon instructions. The complaint as to instruction No. 1, given on behalf of appellee, is, it ignores the ground set up in the third count of the declaration. The instruction has reference only to liability by reason of the alleged negligence charged in the first and second counts of the declaration, and we know of no rule or reason requiring a litigant to embrace in each instruction every ground of liability averred in the different counts of the declaration. On the contrary, he may frame an instruction touching upon each separate charge of negligence as set forth in any count.

What we have hereinbefore said in response to the insistence of the appellant company that the liability of the master and the right of the appellee to recover depended upon notice or knowledge possessed by the parties, respectively, or which they should have possessed, of the defective condition of the scaffolding, disposes of the objections to the other instructions given on behalf of the appellee, and also the complaints as to the refusal of instructions asked by the appellant, except as to refused instruction No. 3. Instruction No. 3, asked by appellant, but refused, was no doubt intended to advise the jury that if the scaffold was properly constructed, and was "interfered with and weakened afterwards" by some unauthorized person, the appellant company was not liable, unless it appeared it had notice of such subsequent defect or the circumstances were such that it should be charged with notice. But the instruction as framed asked the court to charge the jury that if the scaffolding was properly constructed and finished on Saturday and gave way on the following Monday, as a matter of law the appellant company was not to be deemed chargeable with notice. If involved in the case at all, it was a question of fact whether, under all the circumstances, the time intervening between the alleged completion of the scaffold and its fall was so short that it should be presumed the appellant could not reasonably have discovered the scaffold had been "interfered with and weakened." The law has no rule about it, consequently the court rightly declined to invade the province of the jury by assuming to decide a question of fact for them.

We think the record is free from error, and the judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

## PHILIP LYNN

v.

## THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed December 22, 1897.*

1. **CRIMINAL LAW**—*trial of police officer for murder—proof of his duties unnecessary.* On the trial of a village marshal for murder the court may refuse to admit proof of his official duties as they are defined by public law, but the jury must be properly instructed concerning them.

2. **SAME**—*official character of defendant is pertinent on trial for murder.* On the trial of a village marshal for murder, his official character is pertinent in determining the legal relations and duties between the defendant and the deceased, and to characterize their respective acts at the time of the killing.

3. **SAME**—*a village marshal may arrest without a warrant, for criminal offenses.* A village marshal is a peace officer, and may arrest a person without a warrant for a criminal offense committed in his presence, and also where a crime has been committed and he has reasonable grounds for believing that the person to be arrested is the criminal.

4. **SAME**—*when instruction in murder trial is erroneous and prejudicial.* An instruction in a murder trial that if the defendant went where the deceased was and provoked a difficulty, into which he voluntarily entered and in which he killed the deceased, then the act could not be justified as being in self-defense, is erroneous and prejudicial, where the defendant was a village marshal called to the scene to quell a disturbance made by the deceased.

5. **SAME**—*officer, when resisted, is not required to decline combat to justify slaying his assailant.* An officer whose duty it is to preserve the peace is not required to decline combat, when resisted in his duties, and to put himself out of danger, before he will be justified in slaying his assailant, as an officer so acting will be protected, though a different rule would prevail as to private individuals.

6. **SAME**—*whether defendant is guilty of murder or manslaughter is for the jury.* Whether a person indicted for murder is guilty of murder or manslaughter must be determined by the jury under proper instructions, and an instruction that if the jury believe certain facts they must find the defendant "guilty of murder" is erroneous.

WRIT OF ERROR to the Circuit Court of Massac county;  
the Hon. A. K. VICKERS, Judge, presiding.

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| 187 | *248 |

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| d190 | *516 |
| 190  | *518 |

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| 170 | 527  |
| 198 | *191 |

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| 170  | 527  |
| d200 | *501 |

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| 170  | 527  |
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At the November term, 1896, of the circuit court of Massac county plaintiff in error was convicted of the crime of murder and sentenced to the penitentiary for sixteen years. From this conviction he has sued out this writ of error.

It appears from the record that plaintiff in error was marshal of the village of Brooklyn, in Massac county. On the second day of May, the day the shooting took place, plaintiff in error borrowed a gun, and had been shooting unmuzzled dogs by order of the mayor. Milas Bradshaw, known among his companions as "Lightning Bug," was a negro, unmarried, but who lived with a woman called Jennie Williams. In the afternoon of said second day of May, Bradshaw and four others, colored persons, two or three being women, were engaged in playing cards in the room of one Ora Shaw, which was back of a restaurant. An alley led from the street, on the east side of the restaurant, to the rear. A saloon adjoined the restaurant on the west, and in the rear of the two buildings was a yard, in which the shooting took place. About five o'clock in the afternoon, while the plaintiff in error was in the vicinity of the saloon, a disturbance occurred between Bradshaw and his mistress, Jennie Williams, and "a woman came screaming in the alley," as Solomon Grace, one of the People's witnesses, swears, "and told him (defendant) that Lightning Bug was whipping his wife, and Lynn (defendant) went back there." This testimony is undisputed. It further appears that when the plaintiff in error reached the rear of the buildings Bradshaw and the other negroes were in the yard. Ora Shaw, another of the People's witnesses, swears: "Jennie and Bug were in a kind of a dispute, and Mr. Lynn (the marshal) walks up and demands peace; says: 'Bug, that is a good woman; you ought not to beat her in that way, and be all the time fussing and fighting and whipping her; if you don't quit I will run you in,'—says, 'If you do it any more I will run you in.'" The woman, Jennie Williams, was there. Her eyes

were blackened from a blow, but it is denied that Bradshaw did it that day. It appears that Bradshaw became angry, got up and commenced cursing the marshal, and started into the saloon, saying, as Solomon Grace swears, "No God damn white son of a bitch" could do anything with him; that he would go home and get his gun. He passed out of the front door of the saloon. In a few minutes he returned to the back yard where the marshal was and again commenced swearing at him. Grace says Bradshaw was standing in front of Ora Shaw's door, about five or six feet from the building, when he got there; that Lynn was standing in the middle of the yard, about thirty feet from Bradshaw; that he had his gun up to his shoulder and was kind of backing and going sideways, and told Bradshaw not to make a step towards him or he would kill him; that he had the gun up to his shoulder when witness first saw him, then brought it down in his hand and then raised it up again; that Lightning Bug said, "You damn white son of a bitch, you are afraid to shoot;" that Lynn then brought up the gun and shot him.

The defendant's testimony as to what occurred at this time was as follows: "The next I saw of him was when he turned the corner of the alley on me there—the alley I had gone up. I commenced backing back around this way and he come up the little walk, and against I got back as far as midway of the house he was midways too, and commenced from there coming on to me, straight towards me, and I kept backing and begging him not to come on to me,—telling him to stay off—I did not want to hurt him. He comes very slow, like he wanted to slip on me. I raised and lowered my gun three times to take aim. The last time I took aim and he got out and was standing between them beer kegs. I told him, I says, 'Bug, I don't want to kill you, but if you come any closer to me I will have to do it.' He just took his left hand and pulled his bosom open. He had on a jumper. They carry ties in them. He jerked his jumper open. He says, 'You

God damn white-livered son-of-a-bitch, I will make you do it!" and he made another step right at me and I shot him. I certainly was afraid he would hurt me. I knew if he got much closer to me he would be able to make a leap for my gun."

Defendant's brother, Boyd Lynn, testified: "I heard Phil halloo, 'Stand back; don't come on me,' and then I went out there. He was going onto Phil. Phil was back against the fence. This Jennie was grabbing at the gun and Lightning Bug was going onto him. There was about eight feet between them. I stepped past and touched Jennie on the shoulder. I says, 'Here, Jennie, stop this; get away; he will not hurt him,' and she turned around to talk to Lightning Bug. I says, 'He will not shoot him if he stays off of him.' He told her he did not want to hurt him. He says, 'If he will stay off of me I will not hurt him.' Phil stepped out to this path. The weeds were high—almost waist high. There is a path that leads across the yard. He backed into that and was making for this door, and Lightning Bug comes along this walk, walking sideways and bemeaning Phil all the time. He called him as hard names as he could. Phil was holding him off, telling him to stop; stay off of him; he did not want to hurt him. Just before the shooting Bug was walking—just keeping even with him. Phil was in this path, and says, 'Stay off and I will not shoot you.' He kept on telling him, so when he got to this door, in front of Ora Shaw's room, there was an open space there between some beer kegs in the path that led to the privy, and there is where he made at him the last time, and Phil says, 'Don't come on me,' and he threwed his bosom back that way and run his right hand back behind him and says, 'God damn white-livered son of a bitch, I will make you shoot; you have not got nerve enough to shoot,' and he made, I guess, two steps towards Phil. Then the shooting took place. Lightning Bug was considered a dangerous man."

Several witnesses were called, among them two policemen from Paducah, who testified that the deceased was a dangerous man.

Under the assignments of error plaintiff in error urges five grounds for reversal: First, the court erred in refusing to admit proper evidence on the part of the defendant; second, in giving improper instructions on the part of the People and also in refusing proper instructions on the part of defendant; third, in overruling motion for a new trial; fourth, in rendering judgment on the verdict; fifth, the verdict was contrary to the law and the evidence.

JAMES C. COURTNEY, (BENJAMIN O. JONES, and ROBERT NUCKOLLS, of counsel,) for plaintiff in error:

The question whether the defendant is guilty of murder or manslaughter is for the jury, and they should be left free to determine that fact for themselves, and an instruction directing them to find the defendant guilty of murder is erroneous. *Patton v. People*, 114 Ill. 505.

Bailiffs, constables, watchmen, etc., while in the execution of their office, are under the peculiar protection of the law,—a protection founded on wisdom and equity and in every principle of political equity, for without it the public tranquillity cannot possibly be maintained or private property secured, nor, in the ordinary course of things, will offenders of any kind be amenable to justice. 1 Russell on Crimes, 532.

In all cases, whether civil or criminal, where persons have a right to arrest and imprison, and, using the proper means for that purpose, are resisted, in so doing they may repel force with force and need not give back, and if the party making the resistance is unavoidably killed in the struggle this homicide is justifiable. 1 Russell on Crimes, 666; 1 Hale, 494.

It is the duty of all peace officers to maintain and preserve the peace, and, when acting in the exercise of their duty, to quell an affray or prevent a breach of the peace.

They are under the peculiar protection of the law, and they are never required to retreat or decline any struggle as against one openly engaged in disturbing the peace, but may stand their ground, and even attack such offenders if necessary to prevent a breach of the peace; and if such an offender is unavoidably killed by such officer in his attempt to prevent a breach of the peace, such killing is justifiable. 1 Hale, 494; 1 Hawkins, 82; 1 Foster, 321; 1 East's Pleas of the Crown, 304; *State v. Dierberger*, 96 Mo. 667; *Head v. Martin*, 85 Ky. 482; *State v. McNally*, 87 Mo. 644; *State v. Anderson*, 1 Hill, (S. C.) 327.

E. C. AKIN, Attorney General, (D. C. HAGLE, C. A. HILL, D. W. HELM, and SAWYER & EVANS, of counsel,) for the People:

To justify the taking of life in self-defense the danger must be so urgent and pressing that in order to save his own life or prevent his receiving great bodily harm the killing of the other must be absolutely or apparently necessary to the party killing. *Gainey v. People*, 97 Ill. 270; *Leigh v. People*, 113 id. 379; *Davisson v. People*, 90 id. 222.

To justify a defendant in killing another it is not enough that he be under reasonable apprehension of danger, but he must at the time have not only a reasonable but a well founded belief, from the surrounding circumstances, that he is actually in danger of losing his life or receiving great bodily harm. *Kinney v. People*, 108 Ill. 519.

While actual danger is not necessary to justify a resort to self-defense, yet circumstances must be such as to induce a reasonably well grounded belief of danger of actual loss of life or great bodily harm. *Kota v. People*, 136 Ill. 659.

A person, when assailed, is required to decline the combat in good faith, and use all measures that would be adopted by reasonable men to procure their safety under similar circumstances. He has no right to take the life of another unless it is actually or apparently necessary,



and the necessity, real or apparent, must be so pressing as to exclude all other reasonable means of safety before he will be justified in slaying his assailant. *Davisson v. People*, 90 Ill. 222; *Leigh v. People*, 113 id. 379.

It makes no difference what threats have been made or what the fear of danger may be, there must be some overt act by deceased before defendant can kill in self-defense. *Wilson v. People*, 94 Ill. 300.

When a man expects to be assaulted, his right to defend himself does not arise until he has done everything to avoid the necessity. Even if another is menacing his life, he must wait until some overt act is done and the danger becomes immediate before he is justified in killing. Moore on Crim. Law, p. 295, sec. 352; 1 East's Pleas of the Crown, 271, 272; 2 id. 272.

In a homicide, in the absence of an apparent well founded danger of great bodily harm or provocation calculated to excite irresistible passion, the law will imply malice. *Peri v. People*, 65 Ill. 18; *Kota v. People*, 136 id. 659.

Proof of character of the defendant as vicious or desperate, is, like proof of threats, admissible only when attacked, and is for the purpose of characterizing an assault made by the deceased. *Leigh v. People*, 131 Ill. 379.

Where a party provokes or brings on a difficulty, into which he voluntarily enters, he cannot claim self-defense. *Gainey v. People*, 97 Ill. 270; *Kinney v. People*, 108 id. 519.

Where the killing of a human being is proved, the burden of proving circumstances in mitigation is upon the accused, unless the proof on the part of the prosecution sufficiently manifested that the crime only amounts to manslaughter. *Kota v. People*, 136 Ill. 655.

Mr. JUSTICE CRAIG delivered the opinion of the court:

Did the court err in the instructions given on behalf of the People?—or, in other words, was the law properly presented to the jury, as applied to an officer whose duty it was to prevent breaches of the peace?

Paragraph 340 of the Criminal Code (Hurd's Stat. 1895, p. 571,) provides: "It shall be the duty of every sheriff, coroner, constable, and every marshal, policeman or other officer of any incorporated city, town or village having the power of a sheriff or constable, when any criminal offense or breach of the peace is committed or attempted in his presence, forthwith to apprehend the offender and bring him before some justice of the peace, to be dealt with according to law; to suppress all riots and unlawful assemblies, and to keep the peace, and without delay to serve and execute all warrants, writs, precepts and other process to him lawfully directed." And paragraph 342 provides: "An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer when a criminal offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it."

The defendant attempted to prove his duties as marshal, but the court, on objection by the People, refused to permit it and sustained the objection. The statute expressly defines the duties of a marshal, and, being the law of the State, it was unnecessary to prove his duties. But he had the right to have the jury properly instructed on the question. Twenty-two instructions were given on the part of the People, and four are particularly objected to as erroneous and misleading. The tenth instruction is in the following language:

"And in this case, if you find, from the evidence, beyond a reasonable doubt, that the defendant went into the back yard behind the saloon of John Workman, of Brooklyn, to where the deceased was, and provoked and brought on a difficulty with the said Milas Bradshaw, in which he, the defendant, voluntarily entered, and in which he used a deadly weapon and killed the said Milas Bradshaw, then you are instructed that the defendant could not excuse said killing on the ground that it was neces-

sary for him to do said killing in order to prevent the said Milas Bradshaw from committing a great bodily injury upon him or taking his life, and you should find the defendant guilty."

The defendant was an officer whose duty it was to preserve the peace. The official character of the officer is pertinent in determining the legal relations and duties of the person killed and the person killing, with respect to each other, and thus characterizing their acts at the time of the killing. In this instruction the jury are told that if the defendant went where the deceased was and provoked and brought on a difficulty with him, into which he voluntarily entered,—regardless of the fact that he was an officer called to preserve the peace and that the difficulty was brought on by his attempt to keep the peace,—they must find defendant guilty. This instruction was erroneous and misleading in view of the testimony in the case. He did not go there voluntarily, but was called to quell a disturbance between the deceased and the woman, Jennie Williams. He was a peace officer, and under the law could arrest without warrant for a criminal offense committed in his presence, or if a criminal offense had in fact been committed and he had reasonable ground for believing that the person to be arrested had committed it. In the case of *Shanley v. Wells*, 71 Ill. 78, which was an action of trespass for assault and battery and false imprisonment by the defendant, a policeman of the city of Chicago, this court said (p. 82): "In *Main v. McCarty*, 15 Ill. 441, it was held that the power to arrest without warrant for breaches of the peace or threats to break it, exists in cases where the act was not done or threat uttered in the presence of the officer, when the charge is freshly made and the officer was required to make the arrest." See, also, *Cahill v. People*, 106 Ill. 621.

The fifteenth instruction given on behalf of the People is as follows:

"A person when assailed is required to decline the combat in good faith, if by so doing he could put himself out of danger, and use all means that would be adopted by reasonable men to procure their safety under similar circumstances; and he has no right to take the life of another unless it is actually or apparently necessary, and the necessity, real or apparent, must be so pressing as to exclude all other reasonable means of safety before he will be justified in slaying his assailant."

Here the jury are told that "a person when assailed is required to decline the combat in good faith, if by so doing he could put himself out of danger, and use all means" to procure his safety. Is it true that an officer whose duty it is to preserve the peace is required to decline a combat when resisted, and should put himself out of danger? Clearly not. The court should give the law as applicable to the facts in evidence in the case. An officer lawfully in the discharge of his duty would be protected where a different rule would prevail as to private individuals. In 1 Russell on Crimes (sec. 3, p. 447, Sharswood's 4th Am. ed.) the author says: "Ministers of justice, as bailiffs, constables, watchmen, etc., while in the execution of their offices are under the peculiar protection of the law,—a protection founded in wisdom and equity and every principle of justice, for without it the public tranquillity can not possibly be maintained or private property secured, nor, in the ordinary course of things, will offenders be amenable to justice. For these reasons the killing of officers so employed has been deemed murder of malice pre-pense, as being an outrage willfully committed in defiance of the justice of the kingdom." The same author, on page 547, says: "Amongst the acts done by permission of the law, for the advancement of public justice, may be reckoned those of the officer who, in the execution of his office, either in a civil or criminal case, kills a person who assaults or resists him. The resistance will justify the officer in proceeding to the last extremity. So that in

all cases, whether civil or criminal, where persons have a right to arrest and imprison, and, using the proper means for that purpose, are resisted, in so doing they may repel force with force and need not give back, and if the party making resistance is unavoidably killed in the struggle this homicide is justifiable." The instruction was clearly erroneous in view of all the facts in the case, and was prejudicial to the defendant.

The sixth instruction on the part of the People is as follows:

"And although the jury may believe, from the evidence, that the opprobrious epithets were used by the deceased to the defendant, yet if the jury further believe, from the evidence, that the defendant immediately revenged himself by the use of a dangerous and deadly weapon in a manner likely to cause the death of the said Milas Bradshaw, and did thereby cause his death as charged, then the defendant is guilty of murder, and the jury should so find by their verdict."

The last clause of this instruction was condemned in *Panton v. People*, 114 Ill. 505, where this court said (p. 509): "The last clause of the second above instruction was wrong in saying, 'and you should find him guilty of murder.' Under the indictment for murder a defendant may be found guilty of manslaughter, and the jury here should have been left free to find in that respect, without being directed by the court how they should find. The court should have said no more in such respect in the instruction than that the jury should find the defendant guilty." The direction by the court in the case at bar was erroneous for the same reason.

For error in giving the tenth, fifteenth and sixteenth instructions on the part of the People the judgment of the circuit court will be reversed and the cause remanded for another trial.

*Reversed and remanded.*

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## THE EAST ST. LOUIS CONNECTING RAILWAY COMPANY

v.

E. J. EGGMANN, Admr.

*Opinion filed December 22, 1897.*

1. RAILROADS—*employees entitled to protection of city ordinance regulating the movement of trains.* An employee of a railroad company, working in its private grounds within city limits, is entitled to the protection of ordinances regulating the speed of trains within city limits and providing for the ringing of the bell on moving engines. (*Illinois Central Railroad Co. v. Gilbert*, 157 Ill. 354, followed.)

2. EVIDENCE—*ordinance alleged to have been violated by railroad company is admissible.* Where the negligence charged against a railroad company for causing the death of one of its employees is the violation of a city ordinance regulating the movement of trains within city limits, the ordinance is admissible in evidence, as proof of its existence is a necessary part of plaintiff's case.

3. INSTRUCTIONS—*when instruction is not ground for reversal though not in approved form.* An instruction which sums up the facts assumed to be necessary to support an action, with the conclusion that if the jury find such facts to be established to find for the plaintiff, is not ground for reversal if no material fact necessary to the right of recovery is omitted. But the practice of so framing an instruction is not approved.

4. SAME—*when instruction in action for negligence is properly modified.* In a suit against a railroad company for causing the death of an employee who was struck by an engine, an instruction to the effect that if the jury believe that the deceased would not have been struck had he not changed his position then no recovery could be had, is properly modified by leaving the circumstance to be considered by the jury in determining whether the deceased was guilty of contributory negligence.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding.

CHARLES W. THOMAS, for appellant:

Section 68 of chapter 114 of the Revised Statutes requires a bell to be rung at least eighty rods from every public highway crossing. This provision is peremptory,

but as this statute was passed for the benefit of the public who traveled the highways, no person can invoke it except he is using the highway. *Railroad Co. v. Neikirk*, 15 Ill. App. 172; *Williams v. Railroad Co.* 32 id. 339; 135 Ill. 491.

An ordinance providing that flagmen be kept at street crossings and the locomotive bell continuously rung is not intended for employees, and its breach can only be taken advantage of by the public, whom it is intended to protect. *Railroad Co. v. Kirksey*, 60 Fed. Rep. 999.

J. M. FREELS, and A. R. TAYLOR, for appellee:

A legislative body, as the agent of the people, has power to pass police regulations for the protection of the lives and limbs of the people. *Lake View v. Tate*, 130 Ill. 254; *Partlow v. Railroad Co.* 150 id. 321; *Dugan v. Railroad Co.* 42 Ill. App. 536; *Railroad Co. v. Eggmann*, 161 Ill. 159; *Railroad Co. v. Gilbert*, 157 id. 355.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an action on the case by appellee, as administrator of Joseph F. Newland, deceased, against appellant, for negligently causing the death of his intestate, under the provisions of sections 1 and 2 of chapter 70 of the Revised Statutes. Upon a trial in the city court of East St. Louis the plaintiff recovered a judgment for \$3500 and costs of suit. On appeal to the Appellate Court for the Fourth District that judgment was affirmed, and the defendant below now prosecutes this further appeal.

The declaration charges that while the deceased was in defendant's employ as a carpenter, constructing a drain near or under defendant's track, on the bank of the Mississippi river, in East St. Louis, the defendant's employees in charge of one of its engines attached to freight cars negligently and carelessly ran the same upon him, thereby so injuring him that he died. It is charged that he was not a fellow-servant with those in charge of the engine,

and that he was in the exercise of due care for his own safety. The negligent acts charged against the servants controlling the engine are, that it was being run at a rate of speed exceeding six miles per hour, contrary to an ordinance of the city of East St. Louis, and that in violation of a like ordinance it was being run without ringing a bell upon the same, these acts of negligence being within the city limits of the city of East St. Louis, and causing the alleged injury. It is then further alleged that said Newland left surviving him a widow, Mary S. Newland, his next of kin, and left no children, and that said widow, by his death, was deprived of her means of support, etc.

The substantial grounds of reversal insisted upon here were all considered, and, we think, correctly decided, by the Appellate Court, as stated in its opinion. We concur in the views expressed in that opinion, and shall only notice a few of the points urged here for a reversal.

The first of these, in natural order, is, that the declaration states no cause of action, and therefore the trial court erred in overruling the defendant's motion in arrest of judgment. The ground of this position is, that the ordinance which the defendant is charged in the declaration with having violated was only intended to protect the public against the danger of moving trains and locomotives at public places, and could have no legal application, as between the railroad company and its employees, to locomotives being run in the company's private grounds. This same question was presented for decision in *Illinois Central Railroad Co. v. Gilbert*, 157 Ill. 354, and decided adversely to the contention here urged. That case was cited and followed in *St. Louis, Alton and Terre Haute Railroad Co. v. Eggmann*, 161 Ill. 155. We have given due consideration to the argument urging the overruling of these decisions, but find no sufficient reason for so doing. The power of the municipality to pass the ordinance, as reasonably tending to protect persons against injury, is not seriously questioned, and we can see no good reason for



holding that a person should be deprived of that protection merely because he is at the time an employee of the company, working in its yards or other private grounds. The declaration stated facts which, if proved, entitled plaintiff to recover.

Objections were made to the introduction of the ordinance, the principal objection being the same as that made to the sufficiency of the declaration, and it follows, from what has already been said, they were properly overruled. The ordinance being the basis of plaintiff's cause of action, proof of its existence was a necessary part of his case.

It is insisted that the giving of plaintiff's first instruction was reversible error, the objection stated being, that it assumes the existence of certain material facts necessary to plaintiff's right of recovery. We agree with the Appellate Court that this is a misapprehension as to the purport of the instruction. It is a summing up of the facts assumed to be necessary to support the action, with the conclusion that if the jury find these facts to be established by the evidence their finding should be for the plaintiff. We have time and again condemned the practice of giving such instructions, and do not wish now to be understood as retracting or modifying anything which we have previously said in that regard. Such a method of presenting a cause of action or defense, under the guise of instructing the jury as to the law of the case, is not to be approved. It has, however, been the uniform rule of decision in such cases, that where an instruction of that character omits no material fact necessary to the right of recovery a reversal will not be ordered because of its having been given. We are inclined to concur with the Appellate Court in holding that the giving of plaintiff's first instruction in this case was not reversible error.

Appellant has no just ground of complaint of the modification of its third instruction. We do not regard the modification as prejudicial error. As asked, the instruc-

tion should have been refused altogether. It was argumentative, and ignored the real issue in the case, namely, whether the defendant was guilty of the negligence charged in the declaration, thereby causing the alleged injury to the deceased while he was in the exercise of due care. It did not, as contended, instruct the jury that if the injury was the result of accident plaintiff could not recover, but in effect told them that if they believed that if the deceased had not changed his position as the engine approached him he would not have been struck, then, as a matter of law, his administrator could not recover no matter what care or diligence deceased was then using to avoid such change in his position. The modification of the instruction gave the defendant the benefit of all the facts upon which it based the conclusion that the plaintiff could not recover, and told the jury that the facts so stated should only be considered in connection with all the other evidence in the case in determining whether deceased was guilty of negligence which directly contributed to his injury, and if they believed, from the evidence, he was so guilty, plaintiff could not recover. We are unable to see how this modification in any way prejudiced the defense.

In our view of the case it is not important to consider whether the defendant asked such an instruction, at the proper time, to find for the defendant as brings before this court a consideration of the question as to whether the evidence tends to support the verdict and judgment below as a matter of law. If, as we have said, the declaration presented a good cause of action, the questions for the jury were very simple:—Did the evidence tend to prove that the locomotive and train were being run at a higher rate of speed than that permitted by the ordinance, or without ringing a bell, as therein required? Did that negligence directly contribute to the injury? and, Was the deceased at the time in the exercise of proper care for his own safety? It cannot be seriously contended that there

was no evidence produced upon the trial tending to establish the affirmative of each of these facts, and hence the verdict and judgment in the circuit court, affirmed in the Appellate Court, conclusively settle them.

We do not regard other grounds of reversal urged of sufficient importance to be further noticed than has been done in the reasoning and conclusion of the Appellate Court, as shown in its opinion. The judgment of that court will accordingly be affirmed.

*Judgment affirmed.*

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CHARLES D. F. SMITH

v.

ALBERT M. BILLINGS *et al.*

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*Opinion filed December 22, 1897—Rehearing denied February 2, 1898.*

1. **SET-OFF**—equity follows the law in allowing set-off, except in special cases. Equity will not allow a set-off where it would not be allowed at law, unless some special equity exists, such as the insolvency of the party owing the cross-demand, or some other special reason calling for the exercise of equitable jurisdiction.

2. **SAME**—demands of defendant unconnected with mortgage debt can not be set off in foreclosure. In a suit to foreclose a mortgage, demands of the defendant against the complainant, of an equitable nature, unconnected with the mortgage debt, and which are the subject of a pending suit in chancery, cannot be set off against the mortgage debt, in the absence of special equitable grounds.

3. **SAME**—what is not sufficient equitable ground for allowing set-off in foreclosure. The fact that unless a set-off is allowed against a mortgage debt a foreclosure and sale of the defendant's homestead will follow, is not sufficient equitable ground for allowing a set-off not allowable at law, where such sale is contemplated by the mortgage contract in the event of the non-payment of the mortgage debt.

4. **PRACTICE**—court may refuse leave to introduce evidence not presented to master. Where a cause has been referred to the master to take and report the evidence, with his conclusions, upon the overruling of the defendant's exceptions to the master's report the court may refuse leave to the defendant to introduce evidence in open court, as such evidence should be presented to the master.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding.

W. P. BLACK, for appellant:

Courts of equity will not grant relief by decreeing the foreclosure of a mortgage, when it is against equity that payment of the mortgage indebtedness should be enforced. *Ex parte Stephens*, 11 Ves. 24.

Set-off is an original ground of equity jurisdiction. Such jurisdiction was entertained by the English courts of chancery long before the passage of any statute on the subject. It was borrowed from the doctrine of compensation in the civil law. Story's Eq. Jur. secs. 1437, 1438; *Jordan v. Bank*, 74 N. Y. 467; *Blake v. Langdon*, 19 Vt. 485; *Hughes v. Trahern*, 64 Ill. 48.

When there are cross-demands between two parties, of such a nature that if both were recoverable at law they would be the subject of a legal set-off, then, if either of the demands is a matter of equitable jurisdiction, the set-off will be enforced in equity. Story's Eq. Jur. sec. 1436a; *Clark v. Cort*, 1 C. & P. 154.

In a suit in equity for the foreclosure of a mortgage the defendant may set off any demand which he may have against the complainant which he could set off had suit at law been brought on the notes. Jones on Mortgages, sec. 1496; Waterman on Set-off, 446; *Bell v. Ward*, 10 R. I. 503; *Peck v. Bligh*, 37 Ill. 317.

Any debt or money claim which defendant has against plaintiff, arising out of ordinary transactions between the parties, which was due and unpaid when suit was brought, can be set off. *Russel v. Redding*, 50 Ala. 448; *Allen v. Maddox*, 40 Iowa, 124; *Smith v. Taylor*, 9 Ala. 633; 8 Gill, 192.

The right of trial by jury does not deprive a court of equity of jurisdiction. *Wolverton v. Taylor*, 43 Ill. App. 424; *Gage v. Ewing*, 107 Ill. 11.

WINSTON & MEAGHER, (SILAS H. STRAWN, and JAMES F. MEAGHER, of counsel,) for appellees:

Unliquidated damages are such damages as require determination by the estimate of a court or jury. They are damages unagreed upon, unascertained and undetermined. 2 Bouvier's Law Dic.; Century Dic.; *Robison v. Hibbs*, 48 Ill. 408.

An unliquidated demand in no way connected with the mortgage debt, for the recovery of which a bill to foreclose a mortgage has been filed, cannot be set off against the mortgage debt unless there be some peculiar equity in the case to take it out of the general rule. *Jennings v. Webster*, 8 Paige, 503; *Derby v. Gage*, 38 Ill. 27; *Downs v. Jackson*, 33 id. 465; *Litch v. Clinch*, 136 id. 410; *Parkinson v. Trousdale*, 3 Scam. 367; *Waterman on Set-off*, sec. 428; *Armstrong v. McKelvey*, 104 N. Y. 179; *Story's Eq. Jur.* (13th ed.) sec. 1436; *Rawson v. Samuel*, 1 C. & P. 161.

Appellant had every opportunity to introduce evidence before the master. He was not entitled to introduce evidence at the hearing of exceptions to the master's report, or after the making of said report. Such a practice would render the report of the master useless. *Gould v. Banking Co.* 136 Ill. 60; *Insurance Co. v. Slee*, 123 id. 579; *Cox v. Pierce*, 120 id. 556; *Huling v. Farwell*, 33 Ill. App. 238.

Per CURIAM: Appellee filed his bill to foreclose a mortgage given by appellant to secure his three promissory notes given for borrowed money. Appellant by his answer and cross-bill claimed the right to set off against the mortgage debt certain alleged demands of his against the complainant, some of a legal and others of an equitable nature, for the recovery of which he then had pending two chancery suits and one action at law. Exceptions to the answer and a demurrer to the cross-bill were sustained, and upon the report of the master a decree was entered for the full amount of the principal and interest due on the mortgage debt and ordering the sale of the

property. The Appellate Court affirmed this decree, and the appellant, still insisting it is erroneous, now asks its reversal here.

The principal contention of appellant is contained in the following propositions taken from his brief: "That in a suit in equity for the foreclosure of a mortgage the defendant may set off any demand which he may have against the complainant which he could set off had suit at law been brought on the notes. Had suit been brought in a court of law to collect the amount due upon the mortgage notes a set-off might be had by the defendant, Smith, of all claims against Billings of a legal character set up in the cross-bill in this case." In support of these propositions, *Peck v. Bligh*, 37 Ill. 317, *Bell v. Ward*, 10 R. I. 503, *Jones on Mortgages*, 1496, *Waterman on Set-off*, 446, and other authorities, are cited. So far as applied to the case at bar, *Peck v. Bligh* is not in point.

If the correctness of the propositions stated by appellant were conceded, they would not embrace the mere equitable demands of appellant, which, at the time they were set up in this suit, were the subject matter of an accounting sought by the two bills in chancery already pending against appellee. Even if the contention be also admitted that the fact that appellant already had suits pending for the recovery of the same demands (and this fact appeared by the cross-bill) would not preclude him from setting off the same demands in this suit, (*Clayes v. White*, 65 Ill. 357, *King v. Bradley*, 44 id. 342,) still, it can not be contended, and we do not understand counsel to contend, that if appellee had brought an action at law to recover the mortgage debt, appellant could, by plea of set-off or otherwise, have set up against the mortgage debt his alleged equitable demands against appellee.

While it is undoubtedly true that equity had original jurisdiction in matters of equitable set-off before the enactment of statutes authorizing set-off in actions at law, (22 Am. & Eng. Ency. of Law, 211, 416, *Hughes v. Trahern*,

64 Ill. 48,) still, as a general rule, equity follows the law, and will not allow a set-off where it would not be allowed at law unless there be shown some special equity, such as the insolvency of the party owing the cross-demand, or some other special ground for the exercise of equitable jurisdiction. Thus it was said in *Raleigh v. Raleigh*, 35 Ill. 512, that "courts of equity will not enforce a set-off not allowed by law unless the party asking it can show some equitable ground for being protected against his adversary's demand. The mere existence of cross-demands is not sufficient." And it was held that insolvency of the one owing the cross-demand is ground for the exercise of equitable jurisdiction. So also "where there has been a mutual credit given by each upon the footing of the debt of the other, so that a just presumption arises that the one is understood by the parties to go in liquidation or set-off of the other." (*Howe Machine Co. v. Hickox*, 106 Ill. 461.) See, also, *Derby v. Gage*, 38 Ill. 27, where the cross-claim was for unliquidated damages and had no connection with the subject matter of the bill, and no showing of insolvency was made. And in *Downs v. Jackson*, 33 Ill. 464, where a bill was brought for contribution and set-off, this court said: "The plaintiff in error was not entitled to the set-off claimed by the bill. There was no proof of the insolvency of the defendant in error, nor of any special equity requiring the set-off to be made. The demands were not necessarily connected with each other. That of the plaintiff in error arose out of the contract of partnership; that of the defendant in error from the sale of certain furniture, and there was no understanding between the parties that the one demand should be set off against the other. They were mere cross-demands. The obligation of the plaintiff in error was to pay his notes when they became due, without reference to the affairs of the partnership, and there is no equity shown for blending the two matters together, contrary to the agreement of the parties." See, also, *Quick v. Lemon*, 105 Ill. 578, where

it was held that the non-residence of the complainant seeking to enforce his judgment would, the same as in cases of insolvency, entitle the defendant to the set-off set up in the cross-bill.

The contention of appellant in the case at bar seems to be,—first, that because the suit to foreclose was in equity, any demands of appellant against appellee enforceable in equity, though in nowise connected, by agreement or otherwise, with the debt or the mortgage, could by answer and cross-bill be set off against the mortgage debt without showing the insolvency of appellee or other special equitable grounds for allowing such a set-off; and second, that sufficient special equity appeared to authorize the set-off when it appeared that if the set-off were not allowed a foreclosure and sale of appellant's homestead would follow. Neither of these positions is tenable. A set-off will not be allowed in equity where it would not at law, unless some special equity be shown. In the next place, the mortgage provided for foreclosure and sale of the property if the mortgage debt should not be paid, and the setting up in the cross-bill that such a result would follow in case the set-off should not be allowed would not, like the allegation of the insolvency or non-residence of the opposite party, show any special equitable reason why equity should entertain the plea of set-off where it would not be entertained at law. In case of insolvency the cross-demand would be lost if the owner of it were not allowed to set it off against the demands of the insolvent against him; but in this case, so far as the pleadings show, any judgment or decree which the cross-claimant may recover against his adversary can be readily collected, and no special equitable ground for allowing the set-off is shown, by alleging that the result contemplated in the contract will follow a default in payment of the mortgage debt. Suppose appellant had set up in his cross-bill a partnership between him and appellee, had asked for a dissolution, and alleged that upon an



accounting and settlement of the partnership affairs it would appear that appellee was indebted to him in a large amount, which he offered to set off against the mortgage debt; would any one contend that, without showing some special equitable reason therefor, such a set-off would be entertained by a court of equity? Surely not. Nor, as to the mere equitable demands set up in the cross-bill and embraced in the two chancery suits previously brought against appellee by appellant, can the set-off be entertained here. It follows that in respect to them no error was committed below.

We shall not consider whether or not error was committed in refusing to allow as a set-off the legal demands of appellant set up in the cross-bill, and which had been sued for in the suit in assumpsit, for the reason that a judgment against appellant in that suit has been affirmed by this court showing that he has no such cross-demands. No reason is perceived why we should inquire whether or not a harmless error has been committed.

Objections were filed before the master by appellant, which, on being overruled, were renewed as exceptions in the circuit court. The court overruled the exceptions, and appellant then asked leave to introduce evidence in open court to sustain his answer. It is insisted that the court erred in refusing this motion. No error was committed. The cause had been referred to the master to take and report the evidence and to report his conclusions. Appellant should have presented his evidence to the master. (*Cox v. Pierce*, 120 Ill. 556.) Nor was appellee required, under the provisions of the mortgage, to give notice to appellant of his election to declare all of the notes due upon the default of appellant in paying the interest and the principal of the two notes which were due.

Finding no harmful error in the record the judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

## THE PITTSBURG BRIDGE COMPANY

v.

JOHN WALKER.

*Opinion filed December 22, 1897.*

1. MASTER AND SERVANT—*effect where foreman is temporarily acting as co-laborer.* Where a servant is injured as the result of an act of the foreman involving the exercise of his authority, the fact that the foreman, at the time of the injury, is temporarily acting as a co-laborer with the injured servant does not relieve the master from liability upon the ground that the men were fellow-servants.

2. SAME—*when servant's injury is the result of foreman's exercise of authority.* Where servants are employed in transporting large pieces of iron framework, in which removal a "tag line" is required to steady the pieces, and the vice-principal orders the tag line dispensed with and attempts to steady the framework with his hands, but, being unable to do so, the framework falls and injures a servant, the fact that the vice-principal is temporarily working as a co-laborer does not make him a fellow-servant with the injured party, so as to relieve the master from liability.

3. NEGLIGENCE—*instruction stating what facts show absence of due care may be refused.* An instruction which holds that proof of certain facts therein specified must, as a matter of law, establish the fact that the plaintiff was not exercising ordinary care, may be refused.

4. SAME—*rule as to servant assuming risks of known dangers.* A servant assumes the risk of known dangers,—such as are so obvious that knowledge of their existence may fairly be presumed; but the law does not imply that he has notice of dangers not obvious to the senses and arising out of extraordinary circumstances.

5. FELLOW-SERVANTS—*whether the relation of fellow-servants exists is a question of fact.* Whether the relation of fellow-servants exists in a particular case is a question of fact, to be determined by the jury under instructions properly defining that relation, and is conclusively settled by the Appellate Court's judgment of affirmance.

*Pittsburg Bridge Co. v. Walker*, 70 Ill. App. 55, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. NATHANIEL C. SEARS, Judge, presiding.

JOHN A. POST, and JOHN B. BRADY, for appellant.

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ARNOTT STUBBLEFIELD, and JAMES B. MCCracken,  
for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court affirming a judgment of the Superior Court in the sum of \$3000, against the appellant company, in favor of the appellee, for damages sustained by him by reason of a personal injury received, as the declaration alleged, through the negligence of the appellant company.

At the close of all the testimony offered in the case the appellant company moved the court to exclude the evidence and direct the jury to return a verdict in its favor, and offered a written instruction to be given the jury to that effect. The court refused to grant the instruction, and this action of the court constitutes an alleged ground of error.

In ruling upon the motion the court orally expressed the view there was no evidence to support any of the counts in the declaration except the second, and counsel for appellant, accepting such remarks of the court as limiting the right of recovery to the second count, have abstracted that count only, and insist the question presented by the motion to direct a verdict in appellant's favor is whether the evidence is sufficient to support a verdict under that count.

The second count avers that appellee, as an employee of the appellant company, was engaged in removing heavy pieces of iron framework, intended to be used in constructing a bridge across the Chicago river, from the bank of the river to the place where such framework should be needed in the construction of the bridge; that in the process of the removal of such framework it was necessary to the safety of the employees that a "tag line" should be attached to the framework wherewith to steady and control the same while it was being hoisted by a block and tackle, and that one Farnsworth, who occupied the

position and discharged the duties of assistant superintendent of the appellant company, refused and neglected to attach such tag line, but undertook to hold and control the framework with his hands, and was unable to or did not do so, whereby the heavy iron framework swung around and struck and injured the appellee. The contention of counsel for appellant is, no proof was introduced tending to show that said Farnsworth was assistant superintendent in the construction of the bridge, and no proof that said Farnsworth refused or neglected to attach a tag line to the framework, or did or said anything about attaching said line. We are unable to agree with counsel in this contention. One Clark was foreman of the force of men with which appellee was connected in the work, but we find abundant testimony tending to show that Farnsworth was a representative of the company and clothed with authority superior to that of Clark. The appellee testified that one Lyons was general superintendent for the appellant company, and that Lyons directed him to obey all orders given by Farnsworth. It appeared from the testimony that in the execution of the particular work in the course of which appellee was injured, Farnsworth was present and exercised authority to direct the manner and course of its execution, and that Clark acquiesced in and recognized Farnsworth's right and power to direct and control the work. The trial court would not have been warranted in assuming to declare the evidence on this point insufficient to justify its submission, as a question of fact, to the jury. The testimony of appellee was to the effect Farnsworth refused to allow the tag line to be attached to the framework in question. It is true, other testimony tended to contradict the statement of the appellee. The conflict thus brought about was settled by the jury adversely to the appellant company. The judgment of the Appellate Court approving the finding of the jury is conclusive the conflict was properly determined.

Complaint is made by the appellant the court refused to give as asked instruction No. 4, as follows:

"The court instructs the jury that if they believe, from the evidence, that the accident to Walker was caused by the act of a foreman while performing the work of a general laborer, such as Walker was himself performing, and not while exercising or discharging the duties of a foreman but while co-operating with the plaintiff, then, as a matter of law, they should find the defendant not guilty."—But added to it the following: "Provided the jury believe, from the evidence, that the plaintiff did not receive any orders or directions from such foreman while performing such work of a general laborer," and gave the instruction as modified by the foregoing addition.

The argument in support of the principle sought to be announced by the instruction as asked is, that at the immediate time appellee received the injury complained of, Farnsworth was exercising the duties of a common laborer and at that exact moment was a fellow-servant with the appellee; that if appellee was injured, as he contends, because of the negligent failure or inability of Farnsworth to hold and control the swinging framework, the common master is not liable for such act of Farnsworth, whether it resulted from his negligence or lack of strength, for the reason it was the act of a fellow-servant. This view is too narrow. The evidence tended to show Farnsworth, in his position as vice-principal, ordered the use of the tag line dispensed with, and adopted as a substitute the plan of attempting to control the swaying framework by seizing it with his hands and holding it in proper position by his unaided strength, and that the primary cause of the injury received by the appellee was the exercise by Farnsworth of authority conferred upon him by the master to order, direct and control the operation of moving the framework from its position on the bank to the place where it was needed to be placed in the bridge, without using the tag line. If the appellant, through Farnsworth

as vice-principal, abandoned the use of a tag line,—a confessedly appropriate and safe device,—and adopted an improper and unsafe method of accomplishing such removal, and injury resulted to appellee in consequence thereof, under such circumstances as the master would be liable if Farnsworth had not personally participated in the execution of the plan, no reason is perceived why liability should be avoided upon the ground Farnsworth personally assisted in endeavoring to perform the work. In so assisting, Farnsworth voluntarily assumed temporarily to labor as a common workman, but he was not any the less the representative of the appellant company nor his position any the less one of superiority. An observation of this court in *Chicago and Alton Railroad Co. v. May*, 108 Ill. 288, is here pertinent. It was there said (p. 299): "The mere fact that the servant exercising such authority sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. \* \* \* When the negligent act complained of arises out of and is the direct result of the exercise of the authority conferred upon him by the master over his co-laborers, the master will be liable. In such case he is not the fellow-servant of those under his charge with respect to the exercise of such power, for no one but himself, in the case supposed, is clothed with authority to command the others." The instruction was properly modified by the court.

Instructions numbered 13, 14 and 16, asked by appellant and refused, were intended, counsel insist, to present the principles exempting a master from liability for an injury received by one of his servants at the hands of a fellow-servant, but in neither of them is the relation of fellow-servants properly defined. Furthermore, it is conceded the doctrine sought to be invoked is not involved unless Farnsworth, whose general duties were those of a governing servant or vice-principal, by reason of his par-

ticipation in the work as a common laborer became temporarily a fellow-servant of appellee,—a consideration ignored in each of these last numbered instructions.

Instructions numbered 12 and 15, also asked by the appellant company and refused, asked the court to declare to the jury, as matter of law, that failure on the part of appellee to exercise ordinary care should be regarded as established if certain facts specified in the instructions were proven. What constitutes ordinary care is a question of fact to be determined by the jury, and the court rightly declined to invade the province of the jury by assuming to declare to them that the particular facts in question were sufficient to charge the appellee with negligence.

Instruction No. 17, refused, assumes to state, as an abstract principle of law, that every employee is presumed to understand and assume the ordinary risks and hazards of the employment, but it is so framed as to be open to the construction the presumption includes every character of peril or danger that may possibly arise in the performance of the duty. An employee assumes the risks of known dangers, and such as are so obvious that knowledge of their existence is fairly to be presumed; but the law does not imply he has notice of dangers or perils not obvious to the senses, and arising solely out of extraordinary or exceptional circumstances. Wharton on Negligence, sec. 206.

Whether the relation of fellow-servant existed in the case at bar was a question of fact, to be determined by the jury under instructions properly defining that relation.

We find no error in the instructions of the court, and are concluded as to the questions of fact by the judgment of the Appellate Court.

The judgment is affirmed.

*Judgment affirmed.*

THE PEOPLE *ex rel.* William W. McIlhany

v.

THE CHICAGO LIVE STOCK EXCHANGE.

*Opinion filed December 22, 1897.*

1. PUBLIC POLICY—*right of individuals to follow business methods which tend to create competition.* Men engaged in trade and commerce may advertise, employ solicitors and offer rewards and inducements to secure trade without violating the law of the land, as such action is in the interest of the public in creating competition.

2. SAME—*efforts to prevent competition by restricting individuals are against public policy.* Efforts to prevent competition by restricting individual efforts and freedom of action in trade and commerce are hostile to public welfare, not consonant with the spirit of our institutions and in violation of law.

3. SAME—*by-laws must be reasonable, and subordinate to public law.* The by-laws which a corporation may adopt for its guidance and government must be such as are reasonable for corporate purposes and within charter limits, and must be subordinate to the constitution and law, and not against the policy of the State nor against public welfare.

4. SAME—*by-law of the Chicago Live Stock Exchange held to be in restraint of trade.* A by-law adopted by the Chicago Live Stock Exchange which prohibits members from employing trade solicitors not members of the association, which limits the number of solicitors which may be employed by members in certain States, and provides that such solicitors must be paid a fixed salary and not allowed to work on commission, is unlawful, being hostile to public welfare and in restraint of trade and commerce.

5. CORPORATIONS—*when State may claim forfeiture for abuse of franchise.* An attempt by a corporation to place restrictions upon trade and commerce and to fetter individual action among its members by preventing competition is hostile to public welfare, and is such an abuse of its corporate franchise as authorizes the State to claim a forfeiture of its charter by an information in the nature of *quo warranto*.

APPEAL from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

On January 24, 1894, Jacob J. Kern, as State's attorney of Cook county, filed in the circuit court of that county a petition, upon the relation of William McIlhany, for leave



to file an information in the nature of *quo warranto* against the Chicago Live Stock Exchange. From a judgment denying the prayer of and dismissing that petition an appeal was prayed and allowed to this court.

The material facts shown by the petition are as follows: Appellee here, respondent below, is a corporation incorporated under the laws of the State of Illinois. The charter states that the object for which the corporation is formed is to establish and maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to provide for the speedy adjustment of all business disputes between its members; to facilitate the receiving and distributing of live stock as well as to provide for and maintain a rigid inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits.

The petition charges that all of the live stock commission merchants who do business at the stock yards in the city of Chicago are members of said corporation, and that through such members said corporation has and exercises entire and absolute control over all the live stock commission business transacted at said stock yards; that because of the control which said corporation has acquired over the live stock commission business it is impossible for any one who is not a member of said corporation to transact a live stock commission business at said stock yards; that relator is engaged in the live stock commission business at said stock yards and is a member of said corporation; that he paid for said membership, and the same is worth, the sum of \$500; that the said corporation, without any power, right or authority, has assumed to enact the following rule or by-law:

"Sec. 7. There shall be no solicitor employed who is not a member of this exchange. There shall be no solicitor employed except on a stipulated salary, which shall

not be contingent on commission earned. Members of the exchange shall file with the secretary thereof, within five days of the time of employment, the name and post-office address of their traveling solicitors. Members shall not employ to exceed three traveling solicitors for each firm in the States of Indiana, Michigan, Wisconsin, Illinois, Missouri, Iowa and Minnesota. Members of a commission firm may solicit in the aforesaid States, provided they be counted as the solicitors allowed therein, and provided further that they comply in all respects with the restrictions governing such solicitors. It shall be a violation of this rule for any solicitor representing, or claiming to represent, a commission firm located in another market, to solicit for any Chicago firm in the States before named; and members shall be held responsible for any violation of this section by their partners or employees at other market centers, and shall be held accountable for the acts of any solicitor who, under the guise of soliciting for a branch house, invades the territory above described and solicits for a Chicago firm. Members may employ an unlimited number of solicitors to solicit outside of the foregoing prescribed territory, provided they comply in all respects with the restrictions governing solicitors. It shall be a violation of this rule for any non-resident member or stockholder of any commission firm to solicit for any commission firm in which he may be interested, unless he be duly registered and employed as a solicitor under the rules and regulations provided. It is provided further, that members representing commission firms or incorporated companies shall be held responsible for any violation of this rule by the non-resident partners or stockholders of said firms or corporations."

The petitioner charges that the above rule operates in restraint of trade and interferes with the just rights of relator and other members of said corporation in the management and conduct of their business; that for the enforcement thereof said corporation has enacted that "any

member of this exchange, or firm in which he may be a partner, violating any of the provisions of this rule, shall be fined not less than \$250 nor more than \$1000 for the first offense; for a second offense, not less than \$500 nor more than \$1000, and if either of such fines is not paid within three days said firm shall be suspended from membership until same is paid; for a third offense they shall be expelled from membership in the exchange." The petition further charges that the business of relator, as well as the business of a large number of other members of the said corporation, extends into the territory comprising the States mentioned in the above rule, and that relator and the other members of said corporation have, and by law ought to have, the right to conduct and extend their business in said territory, and for that purpose to employ such and so many solicitors as they may see fit; that relator and a large minority of the other members of said corporation desire to conduct their business in said territory in open competition; that relator and others of the members of said corporation have engaged solicitors who are not members of said corporation; that said corporation threatens to enforce the provisions of the above rule against relator and said other members, and to expel them from the said corporation; that such action will ruin the business of the members against whom it is taken. The prayer is for leave to file an information in the nature of *quo warranto* against said Chicago Live Stock Exchange, requiring it to appear and show by what right it assumes to exercise the privilege and franchise of enacting said rule or by-law.

On the filing of this petition the court entered a rule directing the respondent exchange to show cause why the petition should not be granted. The exchange filed its answer to the rule, verified by the affidavit of its secretary. The facts disclosed by the answer show that the exchange does no business of any kind itself, but is an organization for the mutual benefit of its members in the

field indicated by the objects stated in its certificate of incorporation; that it has a membership of about 700 persons, mainly live stock commission merchants; that each of its members voluntarily sought such membership, and agreed, in joining it, to abide by such by-laws and rules as it might make; that the exchange has no market and conducts no market; that the Union Stock Yards are the separate and exclusive property of another and different corporation, viz., the Union Stock Yard and Transit Company, a corporation for pecuniary profit, organized by a special act passed April 13, 1865; that upwards of 30,000 persons are employed in the yards, of whom only a small number are members of the exchange; that the exchange has no property at the stock yards except a leasehold of one room for a term of one year; that its rules are adopted in order to carry out the objects of its creation above set forth; that its rules are operative upon and apply to such persons only as have voluntarily sought and obtained membership; that the power of the exchange to make rules, and the validity of its rules establishing uniform rates of commission to be charged by its members, and determining that they may deal as live stock commission merchants only with members of the exchange, have already been inquired into in this court and sustained, both in proceedings by *quo warranto* and by injunction, judgment in the latter case being affirmed both by the Appellate and Supreme Courts. The answer then sets up the substance of the opinion of this court. It also alleges that many evils formerly existed which the rule as to solicitors would be calculated to prevent, among others a tendency to destructive rivalry in the number of solicitors who are sent out into the country by members to solicit shipments of live stock to their respective employers, amounting to a war of solicitation by competing houses, in which those unable to carry it on were defeated and driven out of business, the business demoralized and left in the hands of the victors in the war; that dis-

honest and irresponsible and disreputable solicitors were employed, who used dishonest, irresponsible and disreputable methods and misrepresented the character and credit of rivals; that the business of commission men is confidential and based on a trust relation, rendering it difficult to ascertain and prove the acts of dishonest solicitors, but that such acts bring discredit on the entire trade, and often brought on bitter disputes between members and led to the sale of diseased live stock; that the rules requiring uniformity in the rates of commission and forbidding rebates of commission to shippers were frequently violated by commission merchants, who resorted to the device of appointing consignors as solicitors of their own shipments, and paying to shippers rebates of commission under the guise of compensation for services as solicitors; that the appointment and payment of compensation to alleged solicitors was also used as a collusive device by money lenders to cover usurious loans to commission merchants, and by railway employees to cover extortion and unjust discrimination in the use of transportation facilities; that these rules in question would tend to prevent these evils, and to settle disputes and promote uniformity and co-operation among the members; that membership is a voluntary matter, and that any dissatisfied member can withdraw at any time; that each member, by joining the association, freely and voluntarily surrendered a portion of his natural liberty in the methods of doing this particular business in order to secure the greater advantages of co-operation, uniformity, mutual protection, the settlement of disputes and exclusion of the disreputable methods and diseased products from the business.

The questions presented upon the petition and answer were: First, in enacting said rule or by-law, has appellee abused its corporate franchises? and second, conceding that the enactment of such rule or by-law is an abuse of appellee's franchises, can that abuse be corrected through

an information in the nature of *quo warranto*? The trial court held that the by-law is valid, and thereupon rendered a judgment denying the prayer of the petition and dismissing the same. From that judgment the cause comes, on appeal, to this court.

JACOB J. KERN, State's Attorney, (MORAN, KRAUS & MAYER, of counsel,) for appellant:

In all classes of business the employer and employee should be allowed to contract with each other, unrestrained by others who may demand that the one shall give more or the other receive less, and, as a general rule, when restrictions are placed upon their rights by combinations or associations of men they will be regarded as in violation of law, and void. *Stanton v. Allen*, 5 Denio, 434; *People v. Fischer*, 14 Wend. 9; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. St. 173; *People v. Medical Society*, 24 Barb. 572.

The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. Our constitution guarantees that no person shall be deprived of life, liberty or property without due process of law. *Froerer v. People*, 141 Ill. 171.

The property which each one has in his own labor is the common heritage, and, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guaranty. *Coal Co. v. People*, 147 Ill. 66.

Corporate franchises are granted in trust that they be used to attain the purpose for which they are granted,

and on condition that they be not used to the public detriment. 2 Morawetz on Private Corp. sec. 1024; 2 Beach on Private Corp. sec. 840.

The State is not required to prove an actual injury. It is a sufficient cause of forfeiture if the act be such as, in the nature of things, is calculated to produce injury. 2 Waterman on Corporations, sec. 427; 2 Spelling on Extraordinary Relief, sec. 1820.

Whenever a corporation uses its corporate powers to promote or consummate acts which are in contravention of the public policy of the State it abuses its corporate franchise. *State v. Railway Co.* 45 Wis. 579; *People v. Railroad Co.* 121 N. Y. 582.

Whatever tends to create a monopoly is unlawful, as being contrary to public policy. 2 Addison on Contracts, 743; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. St. 173; *Craft v. McConoughy*, 79 Ill. 346; *Railroad Co. v. Collins*, 40 Ga. 582; *Hazellhurst v. Railroad Co.* 43 id. 13; *Transportation Co. v. Pipe Line Co.* 22 W. Va. 600.

If a corporation does an act or enters into a contract which is in restraint of trade and in contravention of public policy, there is involved a public interest which the State must protect by proceedings in *quo warranto*. *State v. Railway Co.* 45 Wis. 579; *People v. Railroad Co.* 121 N. Y. 582; *People v. Chicago Gas Trust Co.* 130 Ill. 268.

PECK, MILLER & STARR, for appellee:

The granting or denying leave to file an information in the nature of *quo warranto* rests in the sound discretion of the court, and will be reviewed only for abuse. *People v. Waite*, 70 Ill. 25; *People v. Moore*, 73 id. 132; *People v. Calahan*, 83 id. 128; *People v. Railroad Co.* 88 id. 537; *People v. Drainage Comrs.* 31 Ill. App. 219.

An information in the nature of a *quo warranto* does not lie for the enforcement or vindication of a supposed private right. *People v. Cooper*, 139 Ill. 461; *People v. Drainage Comrs.* 31 Ill. App. 219.

By-laws or contracts in restraint of trade are illegal only in the sense that the law will not enforce them. They are simply void. The law does not prohibit the making of contracts in restraint of trade, but merely declines, after they have been made, to recognize their validity. *American Live Stock Com. Co. v. Live Stock Exchange*, 143 Ill. 210.

Power to make by-laws is incident to the grant of corporate existence. 1 Beach on Private Corp. sec. 310.

A by-law cannot be said to be inconsistent with the law of the land merely because it forbids the doing of something which might have been lawfully done before, or requires something to be done which there was no previous obligation to do. *Goddard v. St. Louis Merchants' Exchange*, 78 Mo. 609.

A by-law of a trade company forbidding its members from carrying on the trade separately at a different place from that of the company's domicil is valid. Lumley on By-laws, 31; *King v. Fishermen of Faversham*, 8 T. R. 352.

A by-law of a company chartered for the purpose of maintaining uniform rates of insurance, which requires members to follow uniform rates, is valid. *People v. Underwriters*, 54 How. Pr. 228.

By-laws in partial restraint of trade are valid. Cook on Stockholders, (3d ed.) sec. 700a, p. 1023; *Gunmakers' Co. v. Fell*, Willes, 384.

A by-law that the members of a news association shall not publish news furnished by other associations in the State of New York, news being gathered from the entire world, is valid. *Matthews v. Associated Press*, 61 Hun, 199.

Contracts in partial but not total restraint of trade, and in which the restraint does not go beyond what is reasonable for the protection of the interest of the parties, are valid. *Telegraph Co. v. Railroad Co.* 86 Ill. 246; *Brown v. Rounsavell*, 78 id. 589; *Fowle v. Parke*, 131 U. S. 88; *Linn v. Sigsbee*, 67 Ill. 75; *Navigation Co. v. Winsor*, 20 Wall. 64; *Shade Roller Co. v. Cushman*, 143 Mass. 353; *Match Co. v.*



*Roerber*, 106 N. Y. 473; *Wiggins Ferry Co. v. Railroad Co.* 73 Mo. 389; *Commonwealth v. Canal Co.* 43 Pa. St. 295; *Payne v. Railroad Co.* 81 Tenn. 507; *Leake on Contracts*, 735, 736; *Whar-ton on Contracts*, sec. 442; *Mitchell v. Reynolds*, 1 P. Wms. 181; *United States v. Freight Ass.* 58 Fed. Rep. 58; *Proctor v. Sergeant*, 2 Scott, 289.

"Public policy" is a negative doctrine. It constitutes a limitation upon the validity of contracts to the extent of defining what agreements the courts will not enforce. It is not a ground of affirmative relief. *American Live Stock Com. Co. v. Live Stock Exchange*, 143 Ill. 210; *Steamship Co. v. McGregor*, 23 Q. B. Div. 598; 21 id. 544.

"Public policy" must be clear and beyond dispute to be the ground of any decision of the court. *Richmond v. Dubuque*, 26 Iowa, 191; *Swann v. Swann*, 21 Fed. Rep. 299; *Walsh v. Fussell*, 6 Bing. 161; *Walker's American Law*, 449; 2 *Chitty on Contracts*, (11th Am. ed.) 9, 664; *Kellogg v. Larkin*, 3 Pinney, 123.

Where a corporation has a general franchise, a particular act which it may have committed as an incident to the exercise of that franchise cannot be challenged in a *quo warranto* proceeding, because a *quo warranto* proceeding does not challenge the particular act, but challenges the entire franchise. *People v. Whitcomb*, 55 Ill. 172; *Attorney General v. Salem*, 103 Mass. 138; *State v. Thresher Manf. Co.* 40 Minn. 213; *State v. Lyons*, 31 Iowa, 432; *People v. Turnpike Co.* 2 Johns. 190; *State v. Turnpike Co.* 38 Ind. 71; *State v. Gravel Road Co.* 37 Mo. App. 496; 2 *Spelling on Extraordinary Relief*, secs. 1773, 1812, 1819.

To warrant a court in entertaining an information in the nature of *quo warranto* a case must be presented in which the public, in theory at least, have some interest, and it is not an appropriate remedy against persons alleged to have assumed a trust of a merely private nature, unconnected with public interest. *High on Ex. Legal Rem.* sec. 620.

Mr. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

This corporation, organized as stated in its certificate of organization, was formed "to establish and maintain a commercial exchange; to promote uniformity in the customs and usages of merchants; to provide for the speedy adjustment of all business disputes between its members; to facilitate the receiving and distributing of live stock as well as to provide for and maintain a rigid inspection thereof, thereby guarding against the sale or use of unsound or unhealthy meats; and generally to secure to its members the benefits of co-operation in the furtherance of their legitimate pursuits." The purpose of this corporation, as expressed in this certificate of incorporation, is undoubtedly, if carried out to the fullest extent, in the interest of the people.

The common law refused to recognize restrictions upon trade and business among the citizens of a common country. Under this rule of the common law the right of the laborer to dispose of his skill and industry, and to contract in reference to the same with whom he pleased and at such contract rates as might be agreed on, was recognized and not allowed to be trammelled with restrictions which interfered with individual action and liberty. Combinations and associations of men have no right to place restrictions upon the right of an individual to contract and engage in business, employing such means and agencies as are not prohibited by law. The natural flow of trade and commerce must be unrestricted, and men engaged therein may accelerate its current by all means not unlawful. To this end men engaged in trade and commerce may advertise, employ men to solicit business and offer rewards and inducements to secure trade without violating the law of the land, and in so doing are exercising a right which is in the interest of the public, because competition cannot be hostile to public interests. Efforts to prevent competition and to restrict individual efforts and

freedom of action in trade and commerce are restrictions hostile to the public welfare, not consonant with the spirit of our institutions and in violation of law.

We said in *Frorer v. People*, 141 Ill. 171 (on p. 181): "The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which B, C and D are still allowed by the law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. Our constitution guarantees that no person shall be deprived of life, liberty or property without due process of law. (Art. 2, sec. 2.) And says Cooley: 'The man or the class forbidden the acquisition or enjoyment of property in the manner permitted the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness.'"

In *More v. Bennett*, 140 Ill. 69, we said (p. 76): "Whatever may be the professed objects of the association, it clearly appears, both from its constitution and by-laws and from the averments of the declaration, that one of its objects, if not its leading object, is to control the prices to be charged by its members for stenographic work by restraining all competition between them. Power is given to the association to fix a schedule of prices which shall be binding upon all its members, and not only do the members, by assenting to the constitution and by-laws, agree to be bound by the schedule thus fixed, but their competition with each other, either by taking or offering to take a less price, is punishable by the imposition of fines, as well as by such other disciplinary measures as associations of this character may adopt for the enforcement of their rules. The rule of public policy here involved is closely analogous to that which declares illegal and void contracts in general restraint of trade, if it is not, indeed, a subordinate application of the same rule. As said by Mr. Tiedeman: 'Following the reason of the rule which prohibits

contracts in restraint of trade, we find that it is made to prohibit all contracts which in any way restrain the freedom of trade or diminish competition or regulate the prices of commodities or services.”

In *Braceville Coal Co. v. People*, 147 Ill. 66, it was said (p. 71): “Property, in its broader sense, is not the physical thing which may be the subject of ownership, but it is the right of dominion, possession and power of disposition which may be acquired over it; and the right of property preserved by the constitution is the right not only to possess and enjoy it, but also to acquire it in any lawful mode or by following any lawful industrial pursuit which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage, and, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such way as the laborer shall deem most beneficial and of others to employ such labor, is necessarily included in the constitutional guaranty.”

In other jurisdictions the rule is the same. In *Rex v. Wardens of the Coopers' Co.* 7 T. R. 540, it was held that a by-law limiting the number of apprentices which any member of the company might take was void. In the case of *Tailors of Ipswich*, 11 Coke, 53, a corporation known as the Tailors of Ipswich enacted a by-law to prohibit any tailor from exercising his trade until he had presented himself before the corporation and proved that he had served seven years as an apprentice. This by-law was held void, as being in restraint of trade. See, also, *Gunmakers' Society v. Fell*, Willes, 384. Sustaining the same propositions are *Stanton v. Allen*, 5 Denio, 434; *People v. Fischer*, 14 Wend. 9; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. St. 173; *People ex rel. v. Medical Society of Erie*, 24 Barb. 570.

A case similar to that now under consideration was before the Court of Appeals of Kentucky in *Huston v. Reut-*

linger, 15 S. W. Rep. 857. There the Louisville Board of Underwriters passed a by-law which, among other things, prohibited local companies from employing more than one solicitor, and regulated the manner in which the salary of such solicitor was to be paid. For a violation of this by-law the offending member of the board would forfeit all rights as a member of the association. A local company which had employed more than one solicitor sought to enjoin the enforcement of the forfeiture on the ground that the association had no authority to control the members in the employment of solicitors, etc. A decree was entered in accordance with the prayer of the bill, which, on appeal, was affirmed, the court saying: "The majority of the members, under the guise of producing harmony in this business association, have taken from their individual members the right to determine how many men they shall employ in their private business, and then only such as the association may think fit for the position. Nor can they employ a solicitor for a less period than six months, or offer a solicitor employment within twelve months after the solicitor has severed his connection with any member; are compelled to discharge those in their employ if they have more than one; and, if these by-laws are enforced, have placed their business under the control of the majority vote of the association,—a power the exercise of which was not given by the fundamental law of the order, and doubtless not contemplated when the association was formed. \* \* \* The common law rule, recognized and adopted when business relations were not so multiplied and extensive as now and when less necessity existed for enforcing it, condemned all such restrictions upon trade and business intercourse with men as is found to exist in this case. The right of one to control his own property as he pleases, and to employ those necessary to aid him in his business upon such terms as may be agreed upon, when not in violation of the law of the land, is the rule of the common law, and the right of the laborer to dispose

of his skill and industry to whom he pleases and for the price agreed on is embraced within the same rule. In all classes of business the employer and employee should be allowed to contract with each other unrestrained by others who may demand that the one shall give more or the other receive less, and, as a general rule, when restrictions are placed upon their rights by combinations or associations of men, they will be regarded as in violation of law, and void."

When a corporation is created there goes with it the power to enact by-laws for its government and guidance as well as for the guidance and government of its members. This power is necessary to enable a corporation to accomplish the purpose of its creation. But by-laws must be reasonable and for a corporate purpose, and always within charter limits. They must always be strictly subordinate to the constitution and the general law of the land. They must not infringe the policy of the State nor be hostile to public welfare. The by-law in this case is a restriction on freedom of trade and business. It trammels competition and prohibits an individual from contracting and engaging in business, and from using such agencies and means he may desire not hostile to general law. It is not required for corporate purposes, nor is it included within the purposes declared in the certificate of incorporation. It is therefore unlawful, as this corporation had no right to exercise this power of enacting it under its franchise.

It is not every misconduct on the part of a corporation, or act not consonant with the purpose of its creation, that will destroy its life. An act to thus result must be one which tends to produce injury to the public by affecting the welfare of the people. Where this results there is an abuse of corporate franchise. (*People v. North River Sugar Refining Co.* 121 N. Y. 582.) Attempts to place restrictions on trade and commerce and to fetter individual liberty of action by preventing competition are

hostile to public welfare and affect the interests of the people. Such attempts by a corporation are an abuse of its corporate franchise. Public policy requires that corporations, in the exercise of powers, must be confined strictly within their charter limits, and not be permitted to exercise powers beyond those expressly conferred. The State provides for the creation of corporations. The corporation is its creature, and must always conform to its policy. This duty on the part of corporations to do no acts hostile to the policy of the State grows out of the fact that the legislature is presumed to have had in view the public interest when a charter was granted to the corporation, and no departure from its charter purposes will be allowed which would be hurtful to the public. Where such act is done by a corporation the State may proceed to claim a forfeiture of its charter by an information in the nature of *quo warranto*.

The petition for leave to file an information in the nature of *quo warranto* should have been granted. The judgment of the circuit court was therefore erroneous and is reversed, and the cause is remanded with directions to grant leave to file the information.

*Reversed and remanded.*

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EDWIN H. CARROLL

v.

WILLIAM DRURY *et al.*

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| 170 | 571 |
| 200 | 346 |

*Opinion filed December 22, 1897—Rehearing denied February 4, 1898.*

1. SPECIFIC PERFORMANCE—*specific performance not decreed to carry out an unreasonable interpretation of contract.* An application for specific performance is addressed to the sound legal discretion of the court, and should not be granted to carry out an unreasonable interpretation of the contract.

2. CONTRACTS—*in construing uncertain contract court may look at surrounding circumstances.* In construing a contract uncertain in mean-

ing the court may look at the surrounding circumstances, in order to understand the language in the sense intended by the parties.

3. *SAME*—*reasonable construction given contract by conduct of parties will be adopted.* Where the terms of a contract are uncertain, and the parties have by their conduct placed a reasonable construction thereon, such construction will be adopted by the court.

4. *SAME*—*illustration of rule that court will adopt parties' own construction.* Where a bond for deed providing for payment of the purchase money in three installments contains an uncertain provision concerning allowance of discount, the construction placed upon the contract by the conduct of the parties in making and accepting the first two payments without discount will be adopted by the court, when called upon to construe the uncertain provision.

5. *DISCOUNT*—*definition of term "discount," as used in commerce and as used among bankers.* The term "discount," as generally used, means an allowance or deduction made for pre-payment or prompt payment of a bill or account. Among bankers the term means a deduction made for interest in advancing money upon a bill or note not due,—the taking of interest in advance.

APPEAL from the Circuit Court of Mercer county; the Hon. HIRAM BIGELOW, Judge, presiding.

BASSETT & BASSETT, for appellant.

J. H. CONNELL, and SCOTT & COOKE, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is a bill for specific performance, filed on March 6, 1896, by the appellant against the appellees, setting up that a contract for the sale of 220 acres of land was made by the appellees with the appellant; that the appellant has paid the purchase money called for by the contract, and is entitled to a deed of the premises; and the bill prays that the appellees may be ordered to deliver to appellant such deed. The bill was answered by the defendants thereto, admitting the contract of sale, but denying that the complainant has paid all the purchase money called for by the contract, and alleging that the defendants have executed a deed for said land, and tendered the



same to appellant, and offered to deliver it to him, upon his payment of the balance of the purchase money which remains unpaid; and defendants aver in their answer, that they bring said deed into court and tender it to complainant upon his payment of the balance due on the contract as aforesaid. The cause was referred to a master in chancery, who took testimony and made a report in favor of the contention of the appellant, as herein set forth. Exceptions were filed to this report. Upon a hearing of the case before the circuit court, the exceptions were sustained; the report of the master was overruled, and a new reference was ordered to him, directing that he make a report substantially in accordance with the theory of the appellees, as hereinafter set forth. The defendants below, the appellees here, also filed a cross-bill which was answered by the appellant. Upon a hearing of the cause, the court entered a decree confirming the second report of the master, dismissing the cross-bill, and ordering the delivery of the deed filed in court to the appellant upon his payment of a certain sum of money to the appellee William Drury, within ninety days. The present appeal is prosecuted from the decree so entered.

On August 13, 1895, appellant wrote a letter to the appellee, William Drury, proposing to purchase the land upon certain terms therein stated. This letter, though written by appellant, was signed by one Volentine, an agent of appellee, Drury. Appellee accepted the proposition, contained in the letter, on August 14, 1895, with the exception, that the date of the payment of one of the installments of the purchase money was changed. Thereupon, on August 14, 1895, a bond was executed by the appellees, William Drury and Vashti Drury, his wife, embodying the terms of sale as agreed upon. This bond is in the penalty of \$8000.00, given to Edwin H. Carroll, bearing date August 14, 1895, with the condition, that William Drury had, on the day of the date thereof, sold to Edwin H. Carroll the said 220 acres in Mercer county

for the sum of \$7700.00 "to be paid as follows: \$500.00 upon the delivery of this obligation; \$4000.00 on or before the first day of January, 1896; and \$3200.00 on or before the first day of March, 1897, with seven per cent interest thereon from March 1, 1896. The said William Drury to allow a discount of seven per cent on all payments made prior to March 1, 1896." The bond also contains a provision, that, upon payment of the two first mentioned sums, the obligors agree to convey to Carroll on March 1, 1896, said premises by deed, taking a mortgage thereon to secure the deferred payment, Carroll having the privilege of making such improvements as he may desire; Drury having the use of the pasture until March 1, 1896.

On August 14, 1895, appellant, Carroll, made the cash payment of \$500.00 on the bond. On December 30, 1895, appellant paid the \$4000.00 which was due by the terms of the bond on January 1, 1896. On February 28, 1896, appellant paid to appellee, Drury, the sum of \$2697.00, to apply on the bond. The latter amount was \$503.00 less than \$3200.00, the amount of the third payment. The sum of \$503.00 was seven per cent on the sum total of the three payments made by appellant, to-wit: \$7197.00. Appellee, Drury, claims that appellant had no right to retain such a large amount from the purchase money, and for that reason refused to deliver the deed.

The dispute between the parties in the case at bar arises out of a difference of opinion between them as to the construction of the following clause in the bond: "The said William Drury to allow a discount of seven per cent on all payments made prior to March 1, 1896." The difference arises out of the two meanings of the word "discount."

The term "discount" may be understood, in a general sense, "as a counting off, an allowance or deduction made from a gross sum on any account whatever." (*Duncle v. Renick*, 6 Ohio St. 527). One of the definitions, given by Webster in his dictionary, is: "An allowance upon an

account, debt, demand, price asked, and the like; something taken off or deducted." In the Century Dictionary, one of the definitions given of discount is: "An allowance or deduction generally of so much per cent made for pre-payment or for prompt payment of a bill or account; a sum deducted, in consideration of cash payment, from the price of a thing usually sold on credit; any deduction from the customary price or from a sum due or to be due at a future time." One of the definitions of "discount" given by Bouvier in his dictionary, is as follows: "An allowance sometimes made for prompt payment." Where a merchant sells a bill of goods, and throws off a portion of the price for present payment, such a transaction is "discounting" in one sense of the term. So also, where a creditor makes a deduction from a sum due by a debtor in consideration of his paying the remainder before it becomes due, such a transaction may be said to be "discounting." (*Shover v. Accom. Sav. Fund and Loan Ass.* 35 Pa. St. 223). Appellant contends that the word "discount," as used in the bond, has the meaning above referred to, that is to say, means a rebate on the gross sum of the purchase price of the land of seven per cent without reference to time. The word "discount" in finance, or among bankers, has still another meaning. Such other meaning is thus expressed by Webster in his dictionary: "A deduction made for interest in advancing money upon a bill or note not due; payments in advance of interest upon money loaned." This second meaning is thus expressed in the Century Dictionary: "The rate per cent deducted from the face value of a promissory note, bill of exchange, etc., when purchasing the privilege of collecting its amount at maturity." The discounting of notes or bills has been defined to mean: "Advancing a consideration for a bill or note, deducting or discounting the interest which will accrue for the time the note has to run; the taking of interest in advance is called discount." (*Philadelphia Loan Co. v. Towner*, 13 Conn. 239). The

discounting of a note by a bank is understood to consist in the lending of money upon it and deducting the interest or principal in advance. (*City Bank of Columbus v. Bruce*, 17 N. Y. 515). "Discount" has also in this latter sense been defined to be: "The advance of money not due until some future period, less the interest which would be due thereon when payable." (*Meckler v. First Nat. Bank*, 42 Md. 592; 5 Am. & Eng. Ency. of Law, pp. 678-680). The appellee, Drury, contends, that the word "discount," as used in the bond in the case at bar, has the second meaning thus referred to. The latter species of discount may be called "interest discount."

The appellees were permitted by the court below to introduce letters and parol testimony, for the purpose of determining in what sense the parties understood the word "discount" when they used it in the bond. One of the questions in the case is, whether it was proper to allow the introduction of such testimony, or whether the contract should be interpreted according to the words used in it without reference to evidence *aliunde*. We do not deem it necessary to express any opinion upon this question, as related to the facts of the present case. In construing the bond, it would seem to be unreasonable, that the discount, whether it be given the one or the other of the definitions already referred to, should be made to apply to the first two payments, to-wit: the cash payment of \$500.00 and the \$4000.00 paid on December 30, 1895. As the contract required \$500.00 to be paid in cash, there was no object in allowing a deduction of seven per cent therefrom, because the appellant had no right in any event to ask a credit as to that amount. Nor could it be said that interest should be deducted at the rate of seven per cent for any particular time, because the payment was to be made at once, and not after the lapse of any time. So, also, it would seem to be unreasonable to allow a discount of seven per cent, under either definition, on the payment of the \$4000.00

made on December 30, 1895, because such payment was due on January 1, 1896; and to allow a discount upon the payment of \$4000.00, because it was made prior to March 1, 1896, would be to allow appellant a discount for paying the \$4000.00 when it was due, inasmuch as it was due on January 1, 1896. Discount is allowed for advanced payments before maturity, but if appellant was entitled to a discount for paying the \$4000.00 at any time before March 1, 1896, he might wait until after its maturity on January 1, 1896, and pay it at any time between January 1, 1896, and March 1, 1896. This would seem to be an unreasonable construction of the contract. The words "all payments made prior to March 1, 1896," were probably used because of the following facts: In the original written proposition, made by appellant for the purchase of the land, he proposed to pay the \$4000.00 on March 1, 1896. But when appellee, Drury, accepted the proposition, he changed the date for the payment of the \$4000.00 from March 1, 1896, to January 1, 1896; and, when the bond came to be drawn, the same language was used in the bond as was used in the original proposition, namely, language referring to the making of the two payments, instead of the one, before March 1, 1896.

But, whether this is so or not, the words in the bond, providing for a discount of seven per cent, so far as they have reference to the first two payments, are to be interpreted in accordance with two well established rules of construction. The first is, that the court, in construing a written contract, will endeavor to place itself in the position of the contracting parties, so that it may understand the language used in the sense intended by the persons using it; in other words, the surrounding circumstances may be looked at in construing a contract, where there is any uncertainty of meaning. (*Wilson v. Roots*, 119 Ill. 379; *Turpin v. Baltimore, Ohio and Chicago Railroad Co.* 105 id. 11). The other principle of construction is, that, when the terms of an agreement are in any re-

spect doubtful or uncertain, and the parties to it have, by their own conduct, placed a construction upon it which is reasonable, such construction will be adopted by the court; and, therefore, evidence of acts under the instrument is admissible, as showing the practical construction which the parties themselves have placed upon the instrument. (*Burgess v. Badger*, 124 Ill. 288; *Hall v. Bank of Emporia*, 133 id. 234; 2 Am. & Eng. Ency. of Law,—2d ed.—p. 293).

Here, the testimony shows, that the appellant paid \$500.00 in cash on August 14, 1895, without demanding any discount or deduction whatever; and, also, that on December 30, 1895, he paid the \$4000.00 in full, without claiming any deduction or discount therefrom; and that the appellee, Drury, accepted these payments upon the dates named. This action of the parties would seem to amount to a construction of the contract by themselves, and showed that they regarded the discount, as inapplicable to the two payments of \$500.00 and \$4000.00. This interpretation is a reasonable one, and we are inclined to adopt it. It is unnecessary to determine the meaning of the word "discount," as applicable to the first two payments, by reason of the construction thus given by the conduct of the parties under the contract, or bond. We are the more inclined to this view because of the rule, that applications for specific performance, such as is the bill in the present case, are addressed to the sound legal discretion of the court, (*Harrison v. Polar Star Lodge*, 116 Ill. 279), and should not be granted for the purpose of carrying out any unreasonable interpretation of a contract.

It only remains to consider the discount of seven per cent as applicable to the third payment of \$3200.00, which was due by the terms of the bond on or before the first day of March, 1897, and drew interest at seven per cent from March 1, 1896. This payment was made, less the deduction already specified, on February 28, 1896, and, therefore, prior to March 1, 1896. Hence, appellant is entitled

to a discount upon the amount of this third payment. It is immaterial, which of the definitions of the word "discount" is adopted in determining the amount to be deducted from this third payment, for the reason that, whether seven per cent be deducted therefrom, or whether an "interest discount" be calculated thereon, the result will be the same in either case. Seven per cent of \$3200.00 is \$224.00; and, as the \$3200.00 was due on or before March 1, 1897, it had one year to run, and interest on \$3200.00 for one year at seven per cent is \$224.00. It is true, that the payment was made on February 28, 1896, and interest at seven per cent from February 28, 1896, to the maturity of the note on March 1, 1897, would be about \$225.26, instead of \$224.00. Appellees, however, cannot complain of the smaller allowance of \$224.00, because it is in their interest, and appellant cannot complain of the same, because such smaller amount results from the application of his theory as to the meaning of the word "discount."

We are, therefore, of the opinion that the appellant was entitled to a deduction from the \$3200.00 of \$224.00, whether the one meaning or the other of the word "discount" be adopted. The court below in its decree did not allow such deduction.

Accordingly, the decree of the circuit court is reversed, and the cause is remanded to that court with directions to enter a decree, requiring the appellant to pay to the appellees all of the amount retained by him out of the last payment of the purchase money together with lawful interest thereon, except said sum of \$224.00 which is allowed to him; and that, upon his making such payment, the deed, executed to him by the appellees for the premises in question, be delivered to him.

*Reversed and remanded.*

## THE ADDYSTON PIPE AND STEEL COMPANY

v.

THE CITY OF CHICAGO *et al.**Opinion filed December 22, 1897.*

CREDITOR'S BILL—*a creditor's bill will not lie against a city to reach a debt owing by city to third party. A creditor's bill will not lie against a municipal corporation to enable the complainant to reach a debt owing by the municipal corporation to a third party.*

*Addyston Pipe and Steel Co. v. Chicago*, 58 Ill. App. 273, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

JOHN T. BARKER, for appellant:

A municipal corporation is, strictly, a body politic or corporate. 1 Dillon on Mun. Corp. (4th ed.) sec. 18.

A municipal corporation is a trustee holding property in trust for the use of the public, (*Hyde Park v. Chicago*, 124 Ill. 156, *McCord v. Pike*, 121 id. 288,) and, being a trustee for its constituents, it stands on the footing of other corporations. *Sherlock v. Winnetka*, 59 Ill. 389.

Equity has no power to dispense with the plain requirements of a statute. *Stone v. Gardner*, 20 Ill. 304.

Its jurisdiction is ancient and ample, and not limited to the construction given to garnishment acts. *Smithier v. Lewis*, 1 Vern. 398; *Bulch v. Westall*, 1 P. Wms. 445; *Stone Co. v. Wheeler*, 6 Ill. App. 225.

The public is interested in the enforcement of lawful contracts, as well as in the suppression of illegal transactions. Greenhood on Public Policy, 29.

A contract for work performed under the direction of a board of public works and of superintendents, fixes the liability throughout. *Chicago v. Dermody*, 61 Ill. 481.

A debt due by a municipal corporation to its creditor may, by a creditor's bill, be subjected to the satisfaction



of a judgment against the creditor. *Furlong v. Thomssen*, 19 Mo. App. 364; *Beal v. McVicker*, 3 id. 592; *Pendleton v. Perkins*, 49 Mo. 565; *Lyell v. St. Clair*, 3 McLean, 580; *Stone Co. v. Wheeler*, 6 Ill. App. 225; *Sinking Fund Commissioners v. Bank*, 1 Metc. (Ky.) 174.

WILLIAM G. BEALE, Corporation Counsel, BYRON BODDEN, and EDWARD B. BURLING, for appellees:

Municipal corporations having money to which an individual is entitled are not subject to garnishment at the suit of the creditors of such individual. *Dillon on Mun. Corp.* sec. 101; *Linton v. Chicago*, 45 Ill. 136; *Freibel v. Coleman*, 64 id. 376; *Merwin v. Chicago*, 45 id. 133.

Garnishment proceedings and creditor's bills are practically one and the same kind of litigation, and are both instituted for the same object, viz., to reach money in the possession of third parties due from a judgment debtor to a judgment creditor.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court affirming a judgment of the Superior Court of Cook county, sustaining a demurrer to a creditor's bill brought by the Addyston Pipe and Steel Company, against the city of Chicago and one Michael J. Joyce. It is alleged in the bill that the defendant Joyce had a contract with the city of Chicago, in and about the performance of which the complainant furnished him material and labor which he failed to pay for. The bill then alleges the obtaining of judgment, issuing of execution and return of execution *nulla bona*; that the city holds money and effects which belong to the defendant Joyce, and prays discovery as is provided for in section 49 of the Chancery act. (Hurd's Stat. p. 217.) In brief, the claim made in the bill is, that the city of Chicago is indebted to Joyce for labor performed under his contract with the city, and complainant is entitled, by creditor's bill, to reach the money and com-

pel its payment to complainant. The demurrer was sustained in the Superior Court, and the judgment affirmed in the Appellate Court, on the sole ground that a creditor's bill will not lie against a municipal corporation, and the correctness of that decision is the only question presented by this record.

This court held in *City of Chicago v. Hasley*, 25 Ill. 485, that the property of a municipal corporation like Chicago could not be levied upon and sold under an execution. This decision was predicated upon the ground of public policy. It is there said (p. 486): "There can be no doubt that the property of a private corporation may be seized and sold under a *fi. fa.* for the payment of its debts, as in the case of an individual. \* \* \* The nature, objects and liabilities of political, municipal or public corporations, we think, stand on different grounds. These corporations signify a community, and are clothed with very extensive civil authority and political power. All municipal corporations are both public and political bodies. They are the embodiment of so much political power as may be adjudged necessary by the legislature granting the charter for the proper government of the people within the limits of the city or town incorporated. \* \* \* For these purposes the authorities can raise revenue by taxation, make public improvements and defray the expenses thereof by taxation." The court then goes on to show that if the property of the city could be levied on and sold it would be impossible for it to perform the functions for the people for which it was created.

In *Merwin v. City of Chicago*, 45 Ill. 133, the question arose whether a municipal corporation was liable to garnishment, and the court, after referring to *City of Chicago v. Hasley*, *supra*, with approval, held that it was not so liable. It is there said (p. 135): "The question has been often before the American courts, and, although the decisions are not uniform, in a large majority of the cases it has been held the writ would not lie. The reason given

for these decisions is uniformly the same, and is substantially that given by this court in the case in 25th Ill. It must be decided as a question of public policy. These municipal corporations are in the exercise of governmental powers, to a very large extent. They control pecuniary interests of great magnitude and vast numbers of human beings, who are more dependent upon the municipal, for the security of life and property, than they are on either the State or the Federal government. To permit the great public duties of this corporation to be imperfectly performed in order that individuals may the better collect their private debts would be to pervert the great objects of its creation. That its efficiency for purposes of government would be impaired by holding it liable to garnishment cannot be doubted. A large and growing city like Chicago must constantly have hundreds of persons in its employment, and if the city cannot, at short intervals, make a settlement of these multitudinous accounts, but is liable to be drawn into court at the suit of every creditor of its numerous employees, it will not only be engaged in much expensive and vexatious litigation in which it has no interest, but, if unable to safely pay its employees and contractors, it may lose the services of persons that may be of much value. \* \* \* A municipal corporation can not be properly turned into an instrument or agency for the collection of private debts. It exists simply for the public welfare, and cannot be required to consume the time of its officers or the money in its treasury in defending suits, in order that one private individual may the better collect a demand due from another."

The doctrine announced in *Merwin v. City of Chicago* is fully sustained by the following authorities: *Chamberlain v. Gaillard*, 26 Ala. 504; *City of Memphis v. Laski*, 65 Tenn. 511; *People ex rel. v. Omaha*, 2 Neb. 169; *Nightower v. Slaton*, 54 Ga. 110; *Wallace v. Lawyer*, 54 Ind. 508; *School District v. Gage*, 39 Mich. 486; *McDougal v. Board of Supervisors*, 4 Minn. 189; *Burnham v. City of Fond du Lac*, 15 Wis. 194.

The decision of the questions in these cases, as will be found upon examination, is predicated on the ground of public policy, and they fully sustain the doctrine announced by this court.

If, as we have held, a municipal corporation is not liable to the process of garnishment, upon what ground can a creditor's bill be maintained against a municipal corporation? If it is contrary to public policy to permit the one, upon the same ground and for like reasons must not the other be denied? The process of garnishment and a creditor's bill are, in effect, instituted for the same purpose. They are, as a general rule, instituted to reach money in the hands of a third party due and owing from a judgment debtor to a judgment creditor. A reference to the statute under which the two proceedings are instituted will show their similarity.

Section 1 of the Garnishment act (Hurd's Stat. 1895, p. 829,) provides: "That whenever a judgment shall be rendered by any court of record or any justice of the peace in this State, and an execution against the defendant in such judgment shall be returned by the proper officer 'no property found,' on the affidavit of the plaintiff or other credible person being filed with the clerk of such court or justice of the peace that said defendant has no property, within the knowledge of such affiant, in his possession liable to execution, and that such affiant hath just reason to believe that any other person is indebted to such defendant or hath any effects or estate of such defendant in his possession, custody or charge, it shall be lawful for such clerk or justice of the peace to issue a summons against the person supposed to be indebted to or supposed to have any of the effects or estate of the said defendant, commanding him to appear before said court or justice, as a garnishee, and said court or justice of the peace shall examine and proceed against such garnishee or garnishees in the same manner as is required by law against garnishees in original attachments."

Section 49 of the Chancery act (Hurd's Stat. 1895, p. 223,) provides: "Whenever an execution shall have been issued against the property of a defendant on a judgment at law or equity, and shall have been returned unsatisfied, in whole or in part, the party suing out such execution may file a bill in chancery against such defendant, and any other person, to compel the discovery of any property or thing in action belonging to the defendant, and of any property, money or thing in action due to him or held in trust for him, and to prevent the transfer of any such property, money or thing in action, or the payment or delivery thereof, to the defendant, except when such trust has in good faith been created by, or the fund so held in trust has proceeded from, some person other than the defendant himself. The court shall have power to compel such discovery and to prevent such transfer, payment or delivery, and to decree satisfaction of the sum remaining due on such judgments out of any personal property, money or things in action belonging to the defendant or held in trust for him, with the exception above stated, which shall be discovered by the proceedings in chancery, whether the same were originally liable to be taken in execution at law or not."

Under the section of the statute providing for garnishment, where an execution has been issued and returned no property found a summons may be issued against the person supposed to be indebted, commanding him to answer as garnishee; under the other statute, where an execution has been issued and returned no property found a creditor's bill may be filed. The object attempted to be reached in each case is practically the same. In one case a judgment may be rendered as in an action at law, while in the other a money decree may be rendered. An execution may issue in either case. The two proceedings are so similar and the result to be accomplished under both so nearly the same, that if it is contrary to public policy, as we have held it is, to allow garnishment against a municipal cor-

poration, for the same reason a creditor's bill cannot be sustained. Should the courts hold that a creditor's bill would lie against a municipal corporation to reach money due its employees or contractors, a wide door would be open to all the evils mentioned in *Merwin v. City of Chicago*, and we are not prepared to establish a rule which might lead to such results.

But it is said that in a garnishment proceeding the answer of the city may be controverted and the city thus be required to sustain the answer by evidence, while in a creditor's bill, where the city in its answer denies that it is in any manner indebted, that will end the litigation as to the city, and hence a different rule should be adopted when a creditor's bill is filed. In *Bouton v. Smith*, 113 Ill. 486, it was held that when a bill is for discovery only, and it fails as such, it should be dismissed and could not be retained for any other purpose, but when the bill seeks not only discovery but other relief, the court has jurisdiction to retain the bill for all purposes. Indeed, section 25 of the Chancery act declares that the disclosure shall not be regarded conclusive. That section provides: "When the complainant shall require a discovery respecting the matters charged in the bill the disclosure shall not be deemed conclusive, but, if a replication be filed, may be disproved or contradicted like any other testimony, according to the practice of courts of equity." It is therefore apparent, from the ruling in the case last cited and from the language of section 25 of the statute, that in many, if not all, creditors' bills which might be brought against a municipal corporation there would be as much controversy as would arise in a garnishment proceeding, and hence the rule that should control in the one case should also govern in the other.

We are satisfied that the judgment of the Appellate Court is correct, and it will be affirmed.

*Judgment affirmed.*

## JAMES CONLEY

v.

## THE PEOPLE OF THE STATE OF ILLINOIS.

*Opinion filed December 22, 1897.*

1. **CRIMINAL LAW**—*uncorroborated testimony of accomplice should be acted upon with great caution.* While the uncorroborated testimony of an accomplice may be sufficient to sustain a conviction, yet it is liable to grave suspicion and should be acted upon with the utmost caution.

2. **SAME**—*fact that a co-defendant was promised immunity should be considered in weighing testimony.* The fact that a co-defendant in an indictment for murder was given express assurance that she would not be punished if she would testify against her co-defendant is a circumstance to be considered in weighing her testimony.

3. **SAME**—*effect where immunity is promised by relative in presence of attorney for the State.* The fact that a promise of immunity is made to a co-defendant, a woman of weak mind, by her uncle, in the presence of the assistant prosecuting attorney, who neither repudiates nor explains it, does not lessen the force of the promise as tending to affect the credibility of her testimony.

4. **SAME**—*when conviction for murder on uncorroborated testimony of co-defendant cannot be sustained.* A conviction of a person for murder, on the ground that he advised the crime of killing an illegitimate child, though not present, cannot be sustained upon the uncorroborated testimony of his co-defendant, the child's mother, who committed the crime, where the latter is so insane at the time of the trial as to be incompetent as a witness and her testimony is wholly contradicted by the party convicted.

5. **WITNESSES**—*one mentally incapable of understanding an oath is not a competent witness.* One who is so deficient in understanding as to be incapable of comprehending the nature and obligation of an oath is not a competent witness.

WRIT OF ERROR to the Circuit Court of Edgar county;  
the Hon. F. BOOKWALTER, Judge, presiding.

H. S. TANNER, and J. W. HOWELL, for plaintiff in error.

EDWARD C. AKIN, Attorney General, (D. C. HAGLE,  
C. A. HILL, H. H. VANSELLAR, State's Attorney, and  
FRANK T. O'HAIR, of counsel,) for the People.

Mr. JUSTICE WILKIN delivered the opinion of the court:

At the March term, 1897, of the Edgar Circuit court plaintiff in error, James Conley, and Bertha Wilson were jointly indicted for the crime of murder, the charge being that they caused the death of the illegitimate child of said Bertha by strangling. They each entered the plea of not guilty, and were tried together at the same term of court to which the indictment was returned. The verdict of the jury was that the defendant Bertha Wilson committed the act charged in the indictment, but was at the time a lunatic or insane person, and that she had not entirely and permanently recovered from such lunacy or insanity. The judgment of the court as to her was that she be taken to the hospital for the insane, as provided by the statute in such cases. The defendant Conley was found guilty in manner and form as charged in the indictment, and his punishment fixed at imprisonment in the penitentiary for a term of fourteen years. Motions for new trial and in arrest of judgment were overruled and judgment entered upon the verdict, to reverse which this writ of error is prosecuted. The only ground of reversal insisted upon is that the conviction was not justified by the evidence.

There is no controversy as to the fact that on the 10th day of March, 1897, Bertha Wilson was delivered of an illegitimate child at her father's house, in Edgar county, this State, which child was the same day found dead, concealed in a trunk in her room, with an apron-string drawn and tied tightly around its neck. So far as the evidence discloses she was alone, wholly unattended, at the time of its birth, and that her father and other members of the family, although sleeping in the same house, knew nothing of the birth until the arrival of a physician some hours later. The girl was about twenty-one years of age. Her mother had been dead for several years, and she and four brothers and one or two sisters lived with the father as a family, but whether all the other children



were at home that morning does not appear. Her father, John Wilson, testified as follows: "On or about the 10th of last March I got up about four o'clock in the morning and made the fires. She came to my room and said she felt sick to the stomach. I said, 'Had I better go for the doctor or anybody?' She said it would wear off, and she sat down in the rocking chair until half-past four, and I got up again and laid on the bed within about a foot of her. I got up and went in the dining room, made up a fire and got breakfast. She said she would get breakfast, but she didn't get any better. I waked up the two boys and we ate breakfast. She still sat in the rocking chair. They took their axes and I done up the dishes. I gave her some coffee. She said she felt better and I went over to camp. I told a fellow to send his wife over, I wanted to go for a doctor. When the doctor came she said she had been pregnant. She told me what had occurred, and we examined the house and found it in the trunk. She did not tell me who the mother of the child was. She would not talk to me about it. She was within ten feet of me, and I didn't hear nothing of the crying or anything else, and the two boys were present with me at the time." Dr. Darby, a witness for the People, testified he had known the defendants, Conley and Bertha Wilson, since their births; that he called on Bertha on March 10, 1897, and found she had been pregnant and delivered of a child, with the afterbirth undelivered; that he made further investigation and found the child in a trunk, with an apron-string around its neck; that he thought its death was caused by strangulation, as the string was tied tight enough to strangle it; that no person can live with a cord as tight as that was around its neck; that there was nothing about the child by which he could tell whether or not it had been born alive. The evidence shows that plaintiff in error, Conley, was acquainted with Bertha Wilson; that he had visited her at her father's house, and had sometimes taken her to church and to neighbors'

houses; that this attention to her had extended back for a year or more prior to the birth of her child.

The State relied upon the testimony of Bertha Wilson alone to connect plaintiff in error with the crime. On the first day of the trial the prosecution called her as a witness, but upon the court's explaining to her that she was not compelled to testify, she availed herself of her right and refused to do so. On the following day she was again called by the prosecution, and upon this occasion was willing to testify for the State. On cross-examination she said she had talked with her uncle,—one of the prosecuting witnesses,—and the assistant prosecuting attorney, and that the latter had urged her to testify. Robert Wilson, the uncle referred to above, testified regarding the conversation mentioned by her, that Bertha was to take the stand, and that he had said "they wouldn't say one word against her; there would be nothing against her; that it would be on Mr. Conley." This conversation appears to have been made in the presence of the assistant prosecuting attorney, and as a part of the conversation in which the latter urged her to testify.

Bertha testified that plaintiff in error was the father of her child; that he had said for her to kill it as she did do; that if she did "not do that he would choke me or lay it out;" that she "was down at his house and he came a piece with me, when he told me to kill it as I did." This was the substance of all her testimony as to Conley's guilt. Plaintiff in error testified that he knew Bertha a long time; that he had kept company with her some; that he had never had sexual intercourse with her at any time, and that there was never any conversation between them about her child, nor what should be done with it if a child were born.

There was a conflict between the testimony of plaintiff in error and that of the witness Robert Wilson, uncle of Bertha, as to a conversation had between them the

day after the coroner's inquest. The testimony of Robert Wilson on this point was as follows: "I was in the sugar camp the day following the post mortem, when James Conley came. Well, we talked a little bit, and after awhile, after we had talked perhaps five or ten minutes, I said to him: 'You and Bertha has caused right smart of trouble; looks like there will be — in this neighborhood.' He said: 'What's that?' I said, 'She has had a child.' I said, 'It will cause a good deal of trouble; you might be the cause of it, for she has had a child and it's killed or it's dead.' He said, 'Is that so?' I said, 'Yes, it 'tis,' and he says, 'Did she kill it?' I said, 'I suppose so; that is what I understand from the coroner's jury—that she killed the child.' 'Well,' he said, 'I am sorry of that.'" At another time the same witness, referring to this same occasion and the reply made by Conley, said: "He stood a minute, and said he was sorry she gave herself away in that way; why didn't she run against something, or fall down and hurt herself." The plaintiff in error, on the witness stand, denied making the last remark but admitted the occasion of the conversation.

Fourteen witnesses who had known Bertha for many years were placed upon the stand in her defense, to show the condition of her mind, and practically all gave the same testimony, which was to the effect that she did not have mental capacity sufficient to distinguish between right and wrong. No attempt was made by the State to rebut this evidence. John Wilson, father of Bertha, testified as to her understanding, as follows: "From my observations her mental capacity is not as good sometimes as at others. She is subject to spells. The doctors think it palpitation of the heart. Well, she falls down and lays through a spasm. There are times I don't really think she knows what she is talking about in some things, and it comes on in spells. They occur sometimes once a month. When these spells are on her I don't think she knows right from wrong. After she has these spells she is weak and

feeble and very nervous." On cross-examination he said: "One spell she had lasted two weeks. They usually last three or four days. When she is over these spells she aims to tell mighty near the truth. So far as I know she aims to tell the truth to me. So far as I know she is honest as anybody at certain times. I couldn't tell whether a person of stronger mind could persuade her to do things. I couldn't tell that far." When questioned as to whether she had a spell on the day of the trial he said: "Why, she isn't clear on it, but she has the touch of one of these spells now. On the day of the inquest I don't think she was at herself. I suppose she had a spell. She is all quivering. Her mother before her had them spells, and probably laid eight hours—one time laid twelve hours. I have lived with my children since the death of my wife, ten years ago. If she (Bertha) was under the influence of one of the spells, what she would state of a fact or circumstance would not be worth noticing."

The theory of the prosecution upon the trial was that plaintiff in error, James Conley, was an accessory to the crime before the fact, having advised and encouraged its commission, not being present. If he was such accessory, he was, by the terms of the statute, indictable and punishable as a principal whether Bertha Wilson was convicted or amenable to justice or not. (Hurd's Stat. 1897, chap. 38, sec. 3, p. 602.)

The only testimony we have been able to find in this record tending in any way to connect plaintiff in error with the crime charged is that of his co-defendant, Bertha Wilson. We are also convinced, after a painstaking examination of all the evidence, that if the conviction of James Conley is sustained it must be upon her unsupported and uncorroborated testimony. While it is the law of this State that the unaided evidence of an accomplice or co-defendant will sometimes sustain a conviction, the court may, in its discretion, direct the jury not to return a verdict of guilty on such uncorroborated testimony.

We said in *Hoyt v. People*, 140 Ill. 588 (on p. 595): "But the authorities agree, and common sense teaches, that such evidence is liable to grave suspicion and should be acted upon with the utmost caution, for otherwise the life or liberty of the best citizen might be taken away on the accusation of the real criminal, made either to shield himself from punishment or to gratify his malice,"—citing Phillips on Evidence, page 111, where the author says: "Accomplices, upon their own confession, stand contaminated with guilt. \* \* \* They are sometimes entitled to even a reward upon obtaining a conviction, and always expected to earn a pardon." See, also, Best on Evidence, p. 266, sec. 170, to the same effect. We also held in the later case of *Campbell v. People*, 159 Ill. 9, that while a jury may convict upon the uncorroborated testimony of an accomplice, such testimony is to be subjected to the same tests which are applied to the testimony of other witnesses, and courts should proceed upon such testimony with great caution; and we there reversed a judgment of conviction, as we had done in the *Hoyt case*, on the ground that the evidence of the accomplice was not sufficient to authorize the verdict of guilty.

There are several reasons why the testimony of Bertha Wilson is entitled to but very little weight, and one which entirely destroys it as evidence. In the first place, she testified not only with the expectation "to earn a pardon," but under the express assurance that she would not be punished if she would testify. It is true that promise or assurance came directly from her uncle, but it was in the presence of one of the attorneys for the People and was in no way repudiated or explained, and to one of her mental capacity the assurance, being given by the uncle, had perhaps greater influence upon her mind than it would have had if given by the attorney directly. This is in no sense a reflection upon the action of the attorney, but to indicate the weight to be given the testimony of the witness. The evidence of her father is to the effect

that under certain circumstances and conditions of her health she was untruthful or unreliable in her statements. Her testimony is of the most meager and unsatisfactory character, and was generally given by way of answers to direct and suggestive questions.

But, aside from the unreliability of the statements of Bertha Wilson from these considerations, she was clearly an incompetent witness. How can it be consistently said that she was a lunatic or insane person to the extent that she could not distinguish between right and wrong, and therefore not amenable to the law for her criminal acts, and yet be a competent witness? The finding of the jury was, that at the time of the trial she was a lunatic or insane person. This verdict was based upon the testimony of many witnesses who swore that in their opinion she was incapable of distinguishing between right and wrong. Therefore the force and obligation of an oath could have no influence upon her. It is absurd to say that she was so far lunatic or insane as to be irresponsible for her acts, and yet maintain that her co-defendant may properly be convicted on her testimony as a witness. It is not pretended that the verdict of the jury as to her mental condition was not justified by the evidence. The court acted upon that verdict and sent her to an insane hospital. We think her own testimony on the stand and her conduct upon the trial give strong evidence of her want of mental capacity. Persons deficient in understanding to the extent of being incapable of comprehending the relation and obligation of an oath are not competent witnesses. (1 Greenleaf on Evidence, sec. 365.) The author there says: "The repetition of the words of an oath would in their case be but an unmeaning formality."

Without giving weight and credence to the testimony of Bertha Wilson it is not claimed the conviction of plaintiff in error can be sustained. He positively denied his guilt and that he was the father of the child or that he at any time had improper relations with its mother, and

we find no substantial ground in the evidence to discredit him. It may be possible that he is guilty, but there is, in our opinion, no competent proof in this record of the fact.

The judgment of the circuit court will be reversed, and the case will be remanded for another trial in conformity with the views here expressed.

*Reversed and remanded.*

MARIA J. DAVIS *et al.*

*v.*

THE NORTHWESTERN ELEVATED RAILROAD COMPANY.

*Opinion filed December 22, 1897.*

1. RULES OF COURT—*existence of rule of court must be shown by records.* The existence of a rule of court must be shown by the records of the court. Affidavits as to its existence are not competent.

2. EMINENT DOMAIN—*compensation to be found by regular panel when proceeding is heard in term time.* Section 6 of the Eminent Domain act, (Rev. Stat. 1874, p. 476,) concerning the manner of securing a jury in eminent domain proceedings, applies only when the proceeding is to be heard in vacation. When the proceeding is heard in term time the compensation must be ascertained by a jury from the regular panel.

3. SAME—*when petitioner need not prove inability to agree on compensation.* A condemnation petitioner need not show that he was unable to agree with the owners upon compensation, where, by the pleadings, it appears that the defendants were non-residents and some of them minors.

4. SAME—*verdict, within the range of evidence, not disturbed on appeal.* A condemnation verdict rendered upon conflicting testimony and after the jury had viewed the premises will not be disturbed, on appeal, if within the range of evidence.

5. SAME—*fact that witness has made sales of similar property is admissible.* Where a witness has testified as to the damage to property sought to be taken, evidence of sales of similar property by such witness is admissible for the purpose of determining the credit to be given to his testimony.

6. SAME—*damages—test for determining damage to land not taken.* Where part of a tract of land is taken for the construction of an

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| 170  | 595  |
| 179  | 435  |
| 170  | 595  |
| 91a  | *488 |
| 170  | 595  |
| 190  | *366 |
| 170  | 595  |
| 200  | *251 |
| 170  | 595  |
| 114a | *188 |

elevated railroad, the test for determining the damage to the part not taken is, whether the fair market value of that part is diminished by the taking of a part of the whole tract and by the construction and operation of the railroad.

7. SAME—*right of petitioner to enter, upon giving bond, where owner appeals.* Where a property owner appeals from a condemnation proceeding, the petitioner may, under section 13 of the Eminent Domain act, (Rev. Stat. 1874, p. 477,) file a bond, to be approved by the court, conditioned for the payment of such compensation as shall finally be adjudged, and enter into possession of the property without depositing with the county treasurer the amount of the condemnation judgment.

CARTER, J., dissenting.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

FRANKLIN P. SIMONS, for appellants:

Private property can only be taken for public use by consent of the owner, or by a proceeding to condemn in strict conformity with law. The eminent domain statute is mandatory—not merely directory. *Mitchell v. Railroad Co.* 68 Ill. 286; *Hyslop v. Finch*, 99 id. 171; *Railroad Co. v. Smith*, 78 id. 96; *Railroad Co. v. Chicago*, 132 id. 372; *Reed v. Railway Co.* 126 id. 48; *Railroad Co. v. Galt*, 133 id. 657.

Where the petitioner fails to show an inability to agree with the land owner as to the compensation to be paid, and it does not appear any effort was made to purchase or agree on the compensation or price to be paid for the land sought to be taken, it will be insufficient to give the court jurisdiction or to entitle the petitioner to the right of condemnation. *Reed v. Railway Co.* 126 Ill. 51.

Under the statute it is the payment of the money found by the jury, and not the order of the court, that confers the right of way. Such order, with evidence of payment, will constitute a justification for taking the property condemned. *Bloomington v. Miller*, 84 Ill. 621.

The judgment merely fixes the amount to be paid before property can lawfully be taken. *Chicago v. Barbican*, 80 Ill. 482; *Railway Co. v. Teters*, 68 id. 144.



ELBERT H. GARY, and LEGRAND W. PERCE, for appellee:

It is not a prerequisite to jurisdiction in a condemnation case that petitioner should allege or prove a failure to agree with a non-resident or minor as to amount of compensation. Rev. Stat. chap. 47, sec. 2.

Where a petition for condemnation is filed in term time and made returnable to a regular term, and is not "fixed" for hearing in vacation, it is not a vacation proceeding. Rev. Stat. chap. 47, sec. 3; *Hercules Iron Works v. Railway Co.* 141 Ill. 491.

When judgment has been entered which provides that petitioner may enter into the use and possession of property upon payment of the compensation awarded, and the respondent then perfects an appeal, it is proper for the court to permit the petitioner to enter upon the use of the property pending the appeal, upon giving the requisite bond. Rev. Stat. chap. 47, sec. 13; *Railway Co. v. Phelps*, 125 Ill. 482; *Railroad Co. v. Schneider*, 127 id. 144; *Chapman v. Gates*, 54 N. Y. 143; *Pittsburg v. Scott*, 1 Pa. St. 309; *Mercer v. McWilliams*, 1 Wright, 132; *Shearers v. Commissioners*, 13 Kan. 145; *Jackson v. Winn*, 4 Litt. 322.

In cases involving the amount of compensation to be awarded, the verdict of the jury will not be disturbed if it is within the evidence offered in the case. *Railway Co. v. Moore*, 124 Ill. 329; *Snodgrass v. Chicago*, 152 id. 600; *Railroad Co. v. Blake*, 116 id. 163; *O'Hare v. Railroad Co.* 139 id. 156; *Stockton v. Chicago*, 136 id. 436; *Kiernan v. Railway Co.* 123 id. 188; *Railway Co. v. Johnson*, 159 id. 434; *Ward v. Railroad Co.* 119 id. 293.

Evidence of sales of similar property is admissible to show the value of property sought to be taken, and the trial court has a large discretion in the admission of evidence on the subject. *Cemetery Ass. v. Railroad Co.* 121 Ill. 213; *Peoria Gas Light Co. v. Railway Co.* 146 id. 372; *Mills on Eminent Domain*, par. 170.

Mr. CHIEF JUSTICE PHILLIPS delivered the opinion of the court:

Appellee was engaged in building an elevated railroad between Wilson avenue and Harrison street, and it became necessary to acquire the west fifty feet of lots 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28, in sublot 4, Sheffield's addition to Chicago, in section 32, township 40, north, range 14, east of third principal meridian. On these lots were situated seventeen tenement buildings, located on Bissell street, and it became necessary to take about five feet off the rear of said buildings, in addition to the wooden porches thereof. The petition for condemnation was filed September 8, 1894, and was referred to the regular June term, 1895, of the circuit court. Affidavit of non-residence of the appellants was duly filed and publication made pursuant to law. The appearance of appellants was entered on January 4, 1895, and subsequently the cause was set for trial for August 27, 1895.

The first objection made by appellants is, that under the rules of the circuit court of Cook county the time from the third Monday of July to the third Monday of September of each year constitutes a vacation as to all trials by jury and other proceedings therein of a similar nature, and that no jury could be in attendance on said court or selected in the manner provided by said statute for the trial of civil suits, as all except emergency business was suspended at that time. The circuit court issued a venire for seventy-five jurors to appear on the date on which the case was set for trial, it being on a date during the August term, 1895. On that date the appellants entered their challenge to the array, and filed affidavits showing the rule of court and the selection of a jury. It is now insisted that the challenge to the array should have been sustained, as the jury were not selected under section 6 of the Eminent Domain act. The two objections may be considered together.

Whilst a rule of court with reference to the proceedings and practice of the court is binding if not in conflict with the statute or law, yet a rule of court, if it exists, must be shown by the records of the court. So far as presented by the abstract of this case such a rule is not shown to have existed, otherwise than by the affidavits filed in the case. The existence of a rule of court depending upon the record, the rule must be shown by the record, and not by affidavit, and it cannot be said that this record shows a rule of court providing for a vacation from the 15th of July to the 15th of September. By reference to the statute of the State it is found that the terms of court therein provided for include an August term of the circuit court of Cook county, and the presumption would necessarily follow that the court had a jury. If a jury was not in attendance on the court, the common law right to issue a venire existed in the court, and, as expressly provided by section 12 of chapter 78 of the Revised Statutes, "in case a jury shall be required in such court for trial of any cause before the panel shall be filled, \* \* \* the court shall direct the sheriff to summons from the bystanders, or from the body of the county, a sufficient number," etc. In *Hercules Iron Works v. Elgin, Joliet and Eastern Railway Co.* 141 Ill. 491, we said in reference to the Eminent Domain act (p. 496): "There is no provision made for obtaining a jury where the cause is to be heard in term time, and it follows, necessarily, we think, that the compensation is to be ascertained by the jury regularly impaneled for the term. The panel having been selected according to the statute regulating the selection and choosing of jurors for the court, a jury is provided for the ascertainment of compensation as 'prescribed by law.' If jurors from the regular panel called to try the cause were not freeholders, it would, at most, amount to a cause for challenge of the individual jurors." It cannot be held the court erred in hearing the case at the August

term as a regular term, or in overruling the challenge to the array. Jurisdiction existed in the court to hear a case at the August term, and a jury regularly impaneled could ascertain the compensation as prescribed by law, without it being necessary for the court to select a panel as provided by section 6 of the Eminent Domain act.

It is contended that the court had no jurisdiction to entertain the petition unless there was proof of failure on the part of the petitioner to agree with the lot owners as to the amount of compensation. The pleadings show that defendants were non-residents, and that certain of them were minors. In such case it is not necessary to show by proof that the compensation and damage could not be agreed upon. The minors could not make an agreement.

It is insisted that the verdict, in awarding compensation and damage, is not in accordance with the evidence. A great number of witnesses were examined whose testimony was conflicting both as to the value of the property taken and damage to that not taken, and whilst the verdict is not as great as claimed by some of the witnesses on the part of the lot owner, yet it is for a larger amount than is claimed by some witnesses for the petitioner. Without entering into an extended discussion of this evidence it is sufficient to say the amount of compensation awarded by verdict of the jury, or the damage assessed, will not be disturbed if within the evidence offered.

It appears that the jury examined the property and heard testimony, and they were authorized to take that testimony, in connection with their own judgment, into consideration in determining the just compensation, for the rule is, where there is diversity of opinion and conflict of testimony among witnesses as to the value of the property proposed to be taken or damaged, and the jury have made a personal inspection, this court will not reverse on the grounds that the damages are excessive or inadequate or that the evidence does not support the verdict, as the jury have a right to base their verdict, to

some extent, upon their own examination of the property. (*Chicago and Evanston Railroad Co. v. Blake*, 116 Ill. 163; *Ward v. Minnesota and Northwestern Railroad Co.* 119 id. 287; *Snodgrass v. City of Chicago*, 152 id. 600.) In *O'Hare v. Chicago, Madison and Northern Railroad Co.* 139 Ill. 151, it was said (p. 156): "It is next urged that the evidence fails to sustain the verdict,—that it is too small. The evidence bearing upon the value was conflicting, ranging from \$7631 to \$15,000. The verdict was for \$9251, and it is clear that there is ample evidence upon which to predicate the finding. The witnesses severally testified to their experience and means of knowledge, and the jury saw them, and had an opportunity to judge of their intelligence and fairness which we do not possess. Besides, the jury inspected the premises and had the advantage of a personal view and observation, which they were authorized to consider in connection with the evidence heard. We are not, therefore, justified in interfering upon this ground."

The contention in this case is that the verdict is too small. Under the authorities above cited that question was peculiarly within the province of the jury. It was objected on trial that evidence of sales of similar property by witnesses was inadmissible as showing the basis of knowledge of a witness. A trial court has a large discretion in the admission of evidence on this subject, and knowledge of a witness derived from actual sales is never a test of competency, but it is always desired and may be shown for the purpose of determining, not the competency of the witness, but the value to be given his testimony. (*Chicago and Evanston Railroad Co. v. Blake*, *supra*.) The compensation to be paid for land actually damaged is to be found by the jury, from which finding there can be no deduction; but in determining whether the remaining portion of the land from which a parcel has been taken is damaged by the construction and operation of a railroad, the test is, what is the fair market value of such remaining parcel, and how has that value been affected

by reason of the taking of a part of the tract and by the construction and operation of the road. If the value of the part not taken is not diminished then it is not damaged by such construction and operation. *Metropolitan West Side Elevated Railway Co. v. Stickney*, 150 Ill. 362.

It is insisted that the court erred in giving instructions Nos. 4 and 6. No. 4 is to the effect that the compensation to be paid for the parcel of land proposed to be taken is the fair cash value at the date of filing the petition, but that it is the duty of the jury to ascertain such compensation from the evidence, including their own view of the premises. No. 6 is, that in determining whether the remainder of any lot or parcel of land not taken would be damaged by the construction and operation of the railroad, the test question is, whether the fair cash market value of such land or parcel would be less by reason of the part taken and by reason of the construction and operation of the road. Both state correct propositions of law, and it was not error to give the same.

Objection is made to the giving of instruction No. 11, which was to the effect that the jury are the sole judges of the credibility of the witnesses, and each of them, and that the jury were not necessarily bound by the testimony of any witness, but might give it such weight as they believed it to be entitled, and consider the testimony of each witness in connection with the evidence and with their view of the premises. The objection made to this instruction is, that under it, if the jury believed their inspection of the premises furnished a more reliable basis for the assessment of damages than that derived from the testimony, they would be justified in wholly disregarding the testimony of the witnesses. The instruction is not obnoxious to this objection. The jury are not bound to accept absolutely the opinion of a witness as to value. They are the sole judges of the credibility of witnesses, and must apply the test prescribed under the instruction in determining the weight to be given the evidence, and

that evidence, in connection with their view of the premises, constitutes the basis from which they are to find their verdict. There was no error in giving the instruction for the petitioner.

The error assigned in refusing five instructions asked by the lot owners is not well taken. Without extending this opinion by quoting the instructions, it is sufficient to say that the propositions stated therein are included in instructions given. There was no error in the giving or refusing of instructions.

The order of the court entering judgment on the verdict of the jury provides that the appellee should pay to appellants, or to the county treasurer of Cook county for their benefit, the sum of \$39,393 as full compensation and damage, and upon the payment of the same the petitioner might enter upon the property condemned. The judgment further provided for an appeal on the owners entering into bond in the sum of \$250, but, notwithstanding the execution of such bond, the petitioner should have the right to enter upon the use of said property upon entering into bond in the penal sum of \$40,000, with surety to be approved by the court. Counsel for appellants, after the entering of this judgment, moved that appellee should be required to tender this money awarded or pay it into the county treasury. On this motion the court ruled the money would be required to be tendered, when appellants' counsel waived that formality. He then insisted the money should be deposited with the county treasurer. The appellants filed their appeal bond, which was approved, and the appellee filed its bond in the sum of \$40,000, which was also approved. The question presented is, where such bond is required and given and approved, and the lot owner prosecutes an appeal, must the petitioner, in addition thereto, deposit with the county treasurer the amount awarded by the jury?

This cannot be regarded as an open question in this State under the construction given to the Eminent Do-

main act by this court. In *Chicago, Santa Fe and California Railway Co. v. Phelps*, 125 Ill. 482, this court said (p. 486): "The company prayed an appeal to this court, which was allowed 'on petitioner filing bond, on appeal, in the sum of \$5000, with approved security, the said bond to be approved by the judge of the county court and filed in thirty days from that date, \* \* \* the condition of said bond to be for the payment of such compensation as might be finally adjudged in this case.' The court, however, refused to make an order permitting the petitioner to go into possession of the premises sought to be taken, upon the execution of such bond, to which ruling of the court the petitioner at the time excepted. The thirteenth section of the Eminent Domain act, and under which the said order was asked, provides as follows: 'In cases in which compensation shall be provided, as aforesaid, if the party in whose favor the same is ascertained shall appeal such proceeding, the petitioner shall, notwithstanding, have the right to enter upon the use of the property upon entering into bond with sufficient surety, payable to the party interested in such compensation, conditioned for the payment of such compensation as may be finally adjudged in the case; and in case of appeal by the petitioner, petitioner shall enter into like bond, with approved surety.' While this section does not, in express terms, provide that the petitioning company, on its own appeal, shall, upon filing the bond therein provided for, have the right to enter upon the use of the property pending the litigation, nevertheless we think this was the intention of the legislature, and any other construction of it would subject the petitioner to great loss and inconvenience in the case of an oppressive and unjust judgment, from which an appeal would afford the only relief. Upon a careful consideration of the question we are of opinion that the county court erred in not making the order in question. By such entry the petitioner only acquires the temporary use of the premises pending the



litigation, and, so far as any constitutional question is concerned, we perceive no difference, on principle, between a case like this and one where a railway company enters upon the land of another for the purpose of making preliminary surveys and locating its line of road, and the right to do this is not questioned."

Again the same question was before this court in *Atchison, Topeka and Santa Fe Railroad Co. v. Schneider*, 127 Ill. 144, where it was said (p. 151): "The case of *Chicago, Santa Fe and California Railway Co. v. Phelps*, 125 Ill. 482, is decisive of the right of appellant to an order permitting it to enter upon the premises sought to be condemned on filing its appeal bond in conformity with the order granting an appeal, and the court below erred in refusing to make it, but as the same purpose was accomplished by paying the money to the county treasurer, the judgment would not be reversed for that error. Counsel for appellees maintains that by actually taking possession of the buildings in question, and especially by a removal of one of them and permitting the other to stand vacant and fall into ruin, appellant has put it out of the power of the court to grant a view of the premises as they were when occupied by appellees, and therefore another trial cannot be had, as contemplated by the statute, and appellant should for that reason be held to have waived its right to insist upon a reversal and new trial. Assuming that the facts exist as stated (of which there is no proof in the record) and that the question is fairly before us for decision, we have no hesitancy in holding the position untenable. Section 13 of the act, as construed in *Chicago, Santa Fe and California Railway Co. v. Phelps*, *supra*, gives appellant 'the right to enter upon the use of the property' pending the appeal. Section 12 of the same act gives the right of appeal. The position of counsel amounts to saying that the exercise of one of these rights is a waiver of the other, whereas by the very terms of the statute they are concurrent. A personal examination of premises to be

condemned, by the jury, may be desirable in most cases, but is not essential to a trial, under the statute."

In the *Schneider case* it was contended that by taking possession under the judgment appellant was barred from prosecuting its appeal. The point was well taken, unless, under the statute, the petitioner had the right to enter under the judgment and at the same time seek its reversal by appeal. The court held that such right was settled by the *Phelps case*.

We hold that the order and judgment entered by the circuit court were not erroneous.

From a consideration of the entire record the judgment of the circuit court of Cook county must be affirmed.

*Judgment affirmed.*

Mr. JUSTICE CARTER, dissenting.

Mr. JUSTICE MAGRUDER: The learned Chief Justice, with that respect for established authority which always characterizes his official conduct, follows the decisions already made by this court. But it is a serious question, whether the legislature has any power to authorize a railroad company, or a municipal corporation, or any other kind of corporation, to take a man's property, or enter upon it, by merely giving him a bond, and without paying him for his property. The constitution provides that private property cannot be taken without just compensation. Is it just compensation to give a man a bond, which he may be compelled to sue upon, in order to get compensation for the property which is taken from him? As the power thus to take property is sustained by judicial decisions, which it is now difficult to overrule without interfering with much that has already been done and acted upon, it is to be hoped that the legislative branch of the government will ere long come to the relief of the people, and repeal or change this statute so odious, and of such doubtful constitutionality.

JAMES H. PAYNE

v.

THE CHICAGO, ROCK ISLAND AND PACIFIC RY. CO. *et al.*

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*Opinion filed December 22, 1897.*

1. GARNISHMENT—*amount involved is the amount of principal debtor's claim against garnishee.* The amount involved in a garnishment proceeding, as affecting the right of appeal, is the amount of the debt owing by the garnishee to the principal debtor, and not the amount owed by the latter to the judgment or attaching creditor.

2. SAME—*garnishment proceeding against several garnishees is distinct as to each.* A garnishment proceeding against several garnishees is separate and distinct against each, the liability, if any, being separate, and neither can be made liable for the amount of any judgment which may be rendered against the other.

3. SAME—*appeal must be dismissed if amount claimed from garnishee is less than \$1000.* In the absence of a certificate of importance an appeal in a garnishment proceeding must be dismissed by the Supreme Court where the amount claimed to be owing from the garnishee to the principal debtor is less than \$1000.

*Payne v. C., R. I. & P. Ry. Co.* 69 Ill. App. 38, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

JONES, CULVER & JONES, for appellant.

WALTER W. ROSS, (ROBERT MATHER, and W. T. RANKIN, of counsel,) for appellees.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellant obtained a judgment in the circuit court of Cook county for the sum of \$1687.20 in an action of debt, in aid of which action a writ of attachment had been issued and the appellees summoned as garnishees. By their separate answers the garnishees denied, under oath, that they had any money or property of the principal defend-

ant, James E. Lee, in their possession, and denied all liability as garnishees. Appellant did not traverse the answers, as he was permitted by the statute to do, but there was a trial before a jury, at which the court directed a verdict for appellees and entered a judgment on such verdict. The case was removed to the Appellate Court, where the judgment was affirmed, and appellant has prosecuted this further appeal.

A motion to dismiss the appeal has been made by appellees on the ground that the amount involved is less than \$1000. The demand against James E. Lee and the judgment recovered against him were in excess of that sum, and appellant claims that this fixes the amount involved as against the garnishees. But this is incorrect. The garnishment is a proceeding in which the law permits appellant to use the name of his debtor, Lee, to recover for his use from the garnishees such demands as Lee has. The judgment in such cases is in favor of the principal defendant, for the use of the plaintiff, against the garnishee, and the amount involved in the garnishment is to be determined as between them. The direction of the creditor to summon a person as garnishee in an attachment does not indicate or determine the amount or nature of the claim against such garnishee, and there is nothing in the pleadings in this case to show the extent of appellee's claim. The answers were to be taken as true and the garnishees discharged, unless they were excepted to or traversed as provided in the statute. (*Illinois Central Railroad Co. v. Cobb*, 48 Ill. 402; 1 Shinn's Pl. & Pr. secs. 369, 372; 1 Ency. of Pl. & Pr. 842.) Appellant did not take issue on the answers, but the parties proceeded to a trial before a jury and witnesses were examined as to whether the garnishees were indebted to Lee or had any money or property belonging to him in their possession. The amount involved must therefore be determined from the evidence. *Brant v. Gallup*, 111 Ill. 487; *Lake Erie and Western Railroad Co. v. Faught*, 129 id. 257.

The proceeding against the appellees was separate and distinct as to each. It was attempted to enforce a separate and distinct liability against the railway company and against the other garnishees. As to the railway company the controversy was limited to a less sum than \$1000. If judgment had been entered against the company it must have been less than that amount under any claim made or evidence introduced by appellant, and such judgment must have been several against it. The proceeding against each of the garnishees was an independent suit against such garnishees where the liability, if any, was separate, and neither could be made liable for the amount of any judgment which might be rendered against the other. The motion must therefore be sustained as to the appellee the Chicago, Rock Island and Pacific Railway Company, and the appeal is dismissed as to it. (*Farwell v. Becker*, 129 Ill. 261). The controversy as to the other appellees seems to have related to the ownership of the proceeds of four car-loads of cattle shipped from Letts, Iowa, to Alexander, Ward & Conover, at Chicago, amounting to \$2712.44, and as to said appellees the motion is overruled.

The court having directed a verdict for appellees, the question presented here is whether there was any evidence fairly tending to overcome the answers. The burden of proof was upon appellant, and if the evidence did not tend to disprove the answers the direction was proper. (*Kergin v. Dawson*, 1 Gilm. 86; *Lascheur v. White*, 88 Ill. 43; *Cairo and St. Louis Railroad Co. v. Killenberg*, 92 id. 142.) On that question we agree with the Appellate Court, that "the record fails to show any evidence that the garnishees were indebted in any sum to the principal defendant, Lee," and also with the circuit court, which gave the direction to the jury.

The judgment of the Appellate Court in favor of the appellees, except the Chicago, Rock Island and Pacific Railway Company, as to which we have dismissed the appeal, will be affirmed.

## PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RY. CO.

v.

WALTER T. HALEY.

*Opinion filed December 22, 1897.*

1. PARENT AND CHILD—*parent has no implied authority to compromise minor child's cause of action.* A parent has no implied authority, by reason of the existence of the parental relation, to compromise and settle a minor child's cause of action.

2. INFANTS—*next friend cannot settle infant's cause of action without leave of court.* One appointed by the court as next friend of an infant, or recognized by the court as acting in that capacity, has no power to settle the infant's cause of action without leave of court.

3. SAME—*when equity will set aside judgment for damages in favor of minor—res judicata.* A judgment for \$125 against a railroad company in favor of a minor child, as damages for the loss of a leg, will be set aside in equity at the suit of the minor and held not to bar a subsequent suit, where it appears that the judgment was entered in pursuance of an agreement between an attorney for the company and an attorney assuming to act for the minor that the cause of action be compromised and judgment entered for the agreed amount.

*P., C., C. & St. L. Ry. Co. v. Haley*, 69 Ill. App. 64, affirmed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. FARLIN Q. BALL, Judge, presiding.

This was a bill in chancery by the appellee, a minor, who sued by his next friend, to set aside as null and void a judgment in the sum of \$125 entered in his favor near ten years before, against the appellant company, as for the damages sustained by the said minor complainant for the loss of his right leg through the negligence of the appellant company.

The bill alleged that complainant is a minor, and on or about May 26, 1885, had his right leg cut off by and through the negligence of the defendant, and that on July 6, 1893, he instituted a suit, by his next friend, in the Superior

Court of Cook county, against the appellant company, to recover damages for said injury; that during the progress of said suit it was developed the appellant company claimed that his right of action to recover such damages had been adjudicated in an alleged prior action, resulting in a judgment in the circuit court of Cook county entered on the 15th day of July, 1885, in the sum of \$125 in his favor, and that it appeared from the records of said court such judgment had been rendered and that the same had been entered satisfied; that said suit or action in which said alleged pretended judgment was rendered was not authorized by said minor plaintiff, nor by the party whose name was used in such proceeding as his next friend, nor by any one acting in his behalf, nor was the institution of the suit, the entry of judgment or the satisfaction thereof known or authorized by the said complainant or the party alleged to have represented him in the said suit as next friend, nor did he or the said next friend make, authorize to be made or know of any agreement for the institution of the said suit, the rendition of the said judgment or the entry of satisfaction thereof, but that the said suit was a fictitious proceeding, the result of a fraudulent conspiracy between an attorney who assumed to appear as attorney for the plaintiff in the said suit, but who was in fact acting in the interest of the appellant company, and certain representatives of the company, who conspired together and agreed to fraudulently procure of record what they designed should operate as a judgment and bar complainant's right of action for the injury so sustained. The prayer of the bill was that the said judgment should be declared null and void and set aside as in no way binding upon complainant.

The defendants answered the bill, in effect denying all of its allegations, and alleging that the suit which resulted in the judgment was a regular and valid proceeding instituted by the plaintiff, by his next friend, and lawfully conducted without fraud, and that the judgment was a final

adjudication of the complainant's claim for damages. Replication was filed and the cause submitted to and heard by the court upon testimony heard in open court. The court entered a decree granting the complainant the relief prayed, which decree was affirmed by the Appellate Court on appeal, and the appellant brings the record here for review by further appeal from the judgment of the Appellate Court.

GEORGE WILLARD, for appellant.

CASE & HOGAN, (A. W. BROWNE, of counsel,) for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The sole question arising on this record is whether the findings and decree of the court are supported by the proofs. We have carefully read and considered the evidence and think the decree should be affirmed. Upon many points the evidence was directly conflicting, and the ascertainment of the truth as to such disputed points depended largely upon the credibility of the different witnesses and the weight that ought to be given their testimony. The chancellor saw the witnesses and heard them testify, and therefore had superior opportunity to judge as to their reliability and truthfulness and as to the weight which ought to be accorded to their testimony. Aside from this, it appeared from the testimony on behalf of the appellant, the suit was instituted upon the prior agreement of an attorney assuming to represent the minor plaintiff, or the mother of the minor, that the claim of the plaintiff should be compromised by the payment of the sum of \$125, and that the compromise or settlement should be carried into effect by filing a declaration and securing the entry of judgment for that sum and the satisfaction of record thereof, and that the proceedings in court were perfunctory, and but for the purpose of attempting to give valid-



ity to the settlement of the right of the plaintiff to recover damages. We think the court was justified by the evidence in concluding that neither the minor complainant nor his mother, whose name was used in said pretended legal proceeding as his next friend, authorized such action to be instituted or had any knowledge that it was pending in court.

The bill charged that the summons was issued and the declaration, plea and replication filed on the same day the judgment was entered, and we find no denial of such allegations in the answer. It appeared also in the evidence that the declaration was filed at the request of the representative of the appellant company, and that such representative agreed with the attorney who filed the same that he would pay the fee for his services. The chancellor was amply justified in regarding the proceedings in the court as but formal, and as intended solely to employ the functions and powers of the court to give validity to the prior agreement of the representative of the company and the attorney who assumed to be the representative of the minor plaintiff and his mother.

The evidence also warranted the view neither the minor plaintiff nor his mother agreed to settle the claim, or authorized such attorney to make any settlement of the claim, of the plaintiff. Moreover, the plaintiff, being a minor, would not be bound by any agreement made with him, nor had his mother, by reason of the parental relation, any legal right to compromise and settle his right of action. When the alleged settlement was made the mother of the plaintiff had not been appointed or recognized by the court as his next friend, and had no power to act or bind him in that capacity. Had she been appointed to prosecute the suit as next friend of the infant or recognized by the court as acting in that capacity, she would have had "power to claim and pursue the rights of the infant and powerless to yield or cede it to others," (*Chicago, Rock Island and Pacific Railroad Co. v. Kennedy*, 70

Ill. 350,) and would have had no power to make settlement of the demand of the infant except by leave of the court. *Tripp v. Gifford*, 29 N. E. Rep. (Mass.) 208.

It does not appear the case was settled by leave of the court, but the record purports to show it was submitted to the court for trial and decided. The chancellor correctly held the appellee was not concluded by the alleged settlement or compromise of his claim, or by the judgment procured to be entered in pursuance of such agreement.

The decree of the Superior Court and the judgment of the Appellate Court are affirmed.

*Judgment affirmed.*

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JOHN T. COLLINS

v.

J. S. D. MANVILLE.

*Opinion filed December 22, 1897.*

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1. LIMITATIONS—*when suit must be brought on note made and payable in foreign State.* Where a note is executed and made payable in a foreign State, the cause of action arises there, and a suit on the note brought in Illinois must be begun within the time limited by the laws of the foreign State for bringing suit.

2. SAME—*issue and delivery of summons is the commencement of suit.* The issuing of summons, and its delivery to the sheriff, are the commencement of a legal action in this State.

3. SAME—*when cause of action is not barred by reason of failure to obtain personal service within limitation.* Where a suit is begun in Illinois by the issue and delivery of summons on a cause of action accruing in another State, within the time limited by the laws of the latter State, the suit is not barred because of failure to obtain service on the defendant within sixty days after the expiration of that time, as required by the law of the latter State, particularly where such law provides for service of summons by publication.

4. PROCEDURE—*after commencement of suit the form and procedure are governed by law of the forum.* Where suit is begun in Illinois on a cause of action arising in a foreign State, within the time limited by the laws of the latter State, the questions of form and procedure will be governed by the laws of Illinois.

*Collins v. Mancille*, 69 Ill. App. 594, affirmed.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

OLIVER & MECARTNEY, for plaintiff in error.

PECKHAM & BROWN, for defendant in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

In the circuit court of Cook county the defendant in error recovered a judgment for \$8280.80 upon a promissory note payable to his order, dated September 1, 1886, for \$5250, payable twelve months after date, with interest at the rate of six per cent per annum, and the judgment has been affirmed by the Appellate Court.

The note was made and executed in the State of New York, and the cause of action arose there. Defendant has been a citizen and resident of that State since the year 1883, and plaintiff lived in New Jersey when the note was made and until December, 1886, since which time he has been a citizen of Colorado. The time within which suit could be brought in this State was therefore governed by section 20 of our statute in regard to limitations, and if by the laws of the State of New York an action on the note could not be maintained by reason of the lapse of time, the action could not be maintained in this State. That defense was pleaded and interposed at the trial, and the New York statutes were admitted in evidence by written stipulation. The New York code requires that an action of this kind must be commenced within six years after the cause of action has accrued, and this suit was commenced August 31, 1893, by plaintiff filing a *præcipe* and declaration, and causing a summons to be issued and given to the sheriff, directing him to summon the defendant to appear at the next term of the circuit court. An action

on the note was not barred at that time in the State of New York, and under our statute such action could be maintained here. The issuing of the summons and delivery to the sheriff for service were the commencement of action in this State. *Feazle v. Simpson*, 1 Scam. 30; *Chicago and Northwestern Railway Co. v. Jenkins*, 103 Ill. 588; *Schroeder v. Merchants and Mechanics' Ins. Co.* 104 id. 71; *Fairbanks v. Farwell*, 141 id. 354.

The court instructed the jury, in substance, that if the plaintiff, within six years from the maturity of the note, caused summons to be issued and given to the sheriff of Cook county for service, then the action was not barred. It is claimed that this instruction was erroneous because of what occurred after the commencement of the suit, and by reason of further provisions of the New York code as to what should be deemed the commencement of an action in that State. The provisions in question are, in substance, that an action is commenced, within the meaning of the Limitation act of New York, when the summons is served on the defendant, or on a co-defendant who is a joint contractor or otherwise united in interest with him, and that an attempt to commence an action is equivalent to the commencement thereof when the summons is delivered to the sheriff of the county in which the defendant resides or last resided; but in order to entitle the plaintiff to the benefit of this last provision the delivery must be followed, within sixty days after the expiration of the time limited for the actual commencement of the action, by personal service upon the defendant or by the first publication of the summons against him pursuant to an order for service upon him in that manner. In this case there was no service on the defendant within sixty days after the expiration of the six years. The summons was returned by the sheriff "not found," and successive writs, issued for each succeeding term, were returned in like manner until personal service was obtained, five months after the suit was commenced.

It is argued that although the suit was commenced in time in this State and when it might have been brought in New York, yet because the New York code provides for an abatement of the action on account of a subsequent event which prevents the plaintiff from maintaining or continuing it, the same rule of procedure must be adopted here. To this proposition we cannot assent. The form and mode of procedure must be according to the rules of this State. If it were a question of when an action had been commenced in the State of New York, the laws of that State would govern; but the question here is, when was the action commenced in this State?—and as to that our laws must control. The question is purely one of remedy and procedure, governed by the law of the forum. The laws of each State require that the action shall be commenced within a certain time, and it was commenced within that time. It would not only be contrary to all established rules to adopt the procedure of the New York code and abate the action lawfully commenced, but also most unjust, for the reason that the New York code provides a method by which the plaintiff could maintain his action by publication of summons within the time. Our law does not permit such service in an action of assumpsit, and to apply the New York rule would be to deprive him of the benefit of that rule as to service by publication, and cut off his rights by means of the other branch of the rule.

The only other complaint is, that the court refused to grant a new trial on account of newly discovered evidence. The evidence was of a cumulative character and not conclusive of the rights of the parties, and the court did not err in denying the motion for a new trial.

The judgment of the Appellate Court will be affirmed.

*Judgment affirmed.*

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| 170 | 618  |
| 89a | 188  |
| 170 | 618  |
| 90a | 1428 |

## THE WEST CHICAGO PARK COMMISSIONERS

v.

THE CITY OF CHICAGO *et al.**Opinion filed December 22, 1897.*

1. APPEALS AND ERRORS—*points raised for first time in reply brief are not entitled to notice.* Points raised for the first time in the appellant's reply brief are not entitled to notice, as the appellee is debarred from arguing them and the court deprived of the benefit of the argument.

2. ESTOPPEL—*when park commissioners are estopped to question legal existence of streets crossing a boulevard.* Where the owner of property on each side of a boulevard lays out and plats a subdivision, with streets crossing the boulevard, and submits the plat to the park commissioners for approval, and the streets are used by the public, after the recording of the plat, for several years, with the knowledge of and without objection by the commissioners, the latter are estopped to question the legal existence of such streets, although they may not have approved the plat.

3. MUNICIPAL CORPORATIONS—*jurisdiction of city, and park boards, over street and boulevard intersections.* The jurisdiction of a city and of park commissioners over the rectangular areas formed by the intersection of public streets with a boulevard under control of the commissioners is concurrent, and neither has power to cut off or close up the intersecting ways, by viaduct approaches or otherwise, without the consent of the other.

APPEAL from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

H. S. MECARTNEY, for appellant.

WILLIAM G. BEALE, Corporation Counsel, and GEORGE A. DUPUY, Assistant, for appellee the city of Chicago.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

The controversy in this case is between the West Chicago Park Commissioners and the city of Chicago, as to which of them has jurisdiction and control over the rectangular areas which constitute the intersections of South

West boulevard with Nineteenth and Twenty-first streets, in said city. The dispute arose in this way: About the year 1881 the West Chicago Park Commissioners, by condemnation proceedings and other legal means, established the boulevard 250 feet wide, extending south from the middle of the south line of Douglas Park across the right of way of the Chicago, Burlington and Quincy Railroad Company. In the condemnation proceedings \$25,000 was awarded to the railroad company as its damages, but the judgment was never paid, and on February 1, 1883, the commissioners and the company entered into a contract for the building of a viaduct on the line of the boulevard over the right of way, each to do a certain portion of the work, and when the viaduct and approaches were completed the company was to satisfy the judgment or assign it to the commissioners. Nothing was done under the contract, and in 1887 Levi P. Morton, the owner of the fee in the premises on each side of the railroad right of way, laid out and platted a subdivision, with the streets in question crossing the boulevard at right angles. The plat was duly recorded on March 12, 1887, and since that date said streets have been in constant use by the public as streets of said city, and the ordinary traffic thereon has extended across the boulevard with the knowledge of and without objection by the park commissioners. On February 23, 1893, an ordinance of the city of Chicago was duly passed and is still in force, providing for the elevation of the railroad tracks in said city. The old plan and contract for a viaduct contemplated leaving the tracks at their original level, but with the tracks elevated the boulevard would naturally go under them and the viaduct would be useless. The proposed viaduct would also cut off the crossings of these streets across the boulevard by the approaches and retaining walls of masonry. In 1895 the commissioners and railroad company concluded to put in operation their agreement and build a viaduct in accordance with their plan. The city, influenced, perhaps, by

the want of harmony between its plans for track elevation and the plan of the commissioners, objected to the obstruction and cutting off of the crossings of these streets by the proposed approaches. It was not denied that the parties had a right to build a viaduct, leaving these street crossings open under the approaches, but the city insisted that they should not be cut off. The commissioners proposed to make a passageway on each side of the approach, by which travel on Nineteenth street could go north about 250 feet, and, crossing the boulevard, come back to Nineteenth street, and like passageways south from Twenty-first street, by which travel would have to go 400 feet south and come back that distance to said Twenty-first street. They undertook to carry out their scheme, and being prevented by the police force of the city, they filed the bill in this case for an injunction to restrain such interference, and on a hearing the bill was dismissed at their costs.

In the reply brief the point is sought to be made for the first time that the intersecting streets were not laid out according to law. Appellants are not entitled to have this point noticed, for the reason that all propositions must be raised in the original brief, so that appellees may not be debarred from the privilege of argument and the court may have the benefit of such argument. But we are of the opinion that the point is without merit. The law requires the approval of the park commissioners to a plat or subdivision of the property within 400 feet of the boulevard lines. Levi P. Morton submitted the plat in question to the commissioners and it was referred to the subdivision committee. Whether the committee had power to act or what they did does not appear, but the commissioners recognized the streets and the rights acquired without objection, and are certainly now debarred from questioning their legal existence after the lapse of so many years. The streets and boulevard must be regarded as intersecting streets, the former under the control of



the city and the latter under the jurisdiction of the park commissioners. By the statute the most comprehensive powers are given to the city over the streets within its domain, and by the Park act the same power and authority over the boulevard are vested in the park commissioners. Each corporation is of equal power and dignity within the limits assigned to it by the law, and each has an equal right within the areas covered by these intersections, which belong to both in common. It would be the height of absurdity to say that at each intersection of a street with a boulevard the powers of either cease at the line of intersection and begin again when the intersection is passed. It was unquestionably the design of the legislature that a boulevard, when laid out, should be a continuous drive-way for pleasure and that the streets crossing it should be continuous highways. It could not be contemplated that either authority could cut off or close up the intersecting way without leave of the other. If the commissioners have the power to shut up these streets and compel the public to go around 250 feet north or 400 feet south over a new crossing, they have a right to shut them up absolutely. The principle is the same in either case, and the existence of such a power cannot be conceded. The jurisdiction, as we think, is concurrent, the commissioners having jurisdiction over the boulevard for all its uses and purposes, and the city having jurisdiction over the intersecting streets, subject to any limitations of use that may arise out of the park acts.

It is said that the city can raise the streets by approaches so as to go over the viaduct walls and approaches; and while that is doubtless true, the question here is whether they can be coerced into doing so in order to preserve their street crossings. We do not think that is so, and being satisfied with the decree of the circuit court it will be affirmed.

*Decree affirmed.*

W. A. McCUNE, Assignee,

v.

THE AMERICAN SCREW COMPANY *et al.*

*Opinion filed December 22, 1897—Rehearing denied February 2, 1898.*

**APPEALS AND ERRORS**—*appeal from county court in voluntary assignments lies to Appellate Court.* An appeal in a case arising out of the filing of objections in the county court to the report of an assignee for creditors lies direct to the Appellate Court, and it cannot be taken to the circuit court by appeal for trial *de novo*.

*McCune v. American Screw Co.* 70 Ill. App. 631, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Whiteside county; the Hon. JOHN C. GARVER, Judge, presiding.

C. L. SHELDON, for appellant.

JOHN W. ALEXANDER, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

Issues arising out of objections filed by the appellees to the report of the appellant, as assignee of the Novelty Manufacturing Company, an insolvent debtor, were decided by the county court of Whiteside county adversely to the assignee. The appellant prosecuted an appeal to the circuit court of said Whiteside county, which appeal was dismissed on the ground that jurisdiction to entertain the appeal was in the Appellate Court for the Second District, and not in the circuit court. The appellant prosecuted an appeal from the order of the circuit court to the Appellate Court for the Second District, and, the order of the circuit court being affirmed by the Appellate Court, has prosecuted a further appeal to this court.

The only question presented by the record is whether the appeal was properly taken to the circuit court. In *Union Trust Co. v. Trumbull*, 137 Ill. 146, we held that a pro-

ceeding in the county court, under the statute in relation to voluntary assignments for the benefit of creditors, is not a statutory proceeding, but a proceeding in chancery modified and regulated by the statute, and that an appeal from an order or judgment of the county court in such proceeding was controlled by the provisions of section 8 of the act of the General Assembly establishing Appellate Courts of the State, as amended by an act approved June 6, 1887, and should be prosecuted to the Appellate Court, and could not be taken to the circuit court by appeal for trial *de novo*. In *Heinzelman Bros. v. Schrader*, 150 Ill. 227, and *Levy v. Chicago Nat. Bank*, 158 id. 88, it was held the circuit court had no jurisdiction to entertain appeals from the order or judgment of a county court entered in the course of a proceeding of voluntary assignment of an insolvent debtor for the benefit of his creditors, and the ruling in the case of *Union Trust Co. v. Trumbull*, *supra*, was expressly approved. What has been said in the opinions rendered in the cases cited has exhausted discussion of the subject. The question can no longer be regarded as an open one.

The judgment of the Appellate Court is affirmed.

*Judgment affirmed.*

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SAMUEL F. RUSH *et al.*

v.

JONAS M. RUSH *et al.*

*Opinion filed December 22, 1897.*

1. PRACTICE—upon general remandment without directions further evidence may be taken. Where a judgment or decree is reversed and the cause remanded generally for further proceedings, without specific directions, the matter is open, upon re-instatement of the cause, to further action, either by amendment of pleadings or introduction of additional evidence.

2. SAME—what words, on remanding, do not amount to a direction. The words used in the remanding clause of the opinion of the Appellate

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| 170 | 623  |
| 178 | 484  |
| 170 | 623  |
| 184 | 522  |
| 170 | 623  |
| 90a | 1 5  |
| 170 | 623  |
| 206 | 1487 |
| 170 | 623  |
| 211 | 1820 |

Court, "We think he (the defendant) should be compelled to account for the amount of the notes, and the decree will therefore be reversed and the cause remanded," do not amount to a specific direction to the trial court, so as to preclude the introduction of new evidence upon the re-instatement of the cause.

3. **PRINCIPAL AND AGENT**—*agent for collection of notes has no implied authority to take other than money in payment.* An agent employed to collect notes who takes merchandise in payment therefor, which he sells at a loss, is bound to account to the principal for the full amount due on the notes, in the absence of proof of authority from the principal to accept such payment or of ratification by him of the unauthorized act.

*Rush v. Rush*, 65 Ill. App. 548, reversed.

**APPEAL** from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Iroquois county; the Hon. CHARLES R. STARR, Judge, presiding.

KAY & KAY, for appellants.

KERN & HIRSCHI, (PAYSON & KESSLER, of counsel,) for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a proceeding begun in the circuit court of Iroquois county by bill in chancery, wherein Samuel Frank Rush, Joseph Martin Rush, John Rush and Martha A. Thomas are complainants, and Jonas M. Rush, Nancy Rush, Jr., Emma J. Scott (formerly Emma J. Rush) and Nancy Rush, Sr., are defendants, the object of the bill being to compel Jonas M. Rush to account to the complainants for certain indebtedness due and owing Nancy Rush, Sr., which had been placed in his hands for collection, the principal amount in controversy being a debt due from one George Pierce.

Nancy Rush, Sr., is the widow, and the above named parties are the children and heirs, of Samuel Rush, Jr., deceased. The widow was the owner of a large amount of real estate and certain choses in action, the Pierce indebt-

edness, evidenced by two promissory notes, being a part thereof. These children entered into a contract for the purpose of accomplishing a division of her property and the indebtedness due her, by the terms of which, among other things, it was agreed that a part of the claims should be collected by her son John and the remainder by the defendant Jonas M. Rush. In pursuance of that agreement the latter entered into a bond, dated August 3, 1891, conditioned as follows:

*"Know all Men by these Presents, That we, Jonas M. Rush and John W. Scott, of the town of Milford, in the county of Iroquois and State of Illinois, are held and firmly bound unto the heirs of Nancy Rush, Sr., widow of Samuel Rush, deceased, of the town of Milford, in the county of Iroquois and State of Illinois, in the sum of \$6000, for the payment whereof well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.*

*"Witness our hands and seals this 3d day of August, 1891.*

*"The condition of the above obligation is such, that whereas the said Jonas M. Rush has been this day appointed by the said heirs of Nancy Rush, Sr., to collect all debts, rents, mortgages and credits now due the said Nancy Rush, Sr., or that may hereafter become due, and to pay all just debts against the said Nancy Rush, Sr., or against her estate, so far as the moneys, credits, rents and profits may go, and the said Jonas M. Rush shall have the collection of all the promissory notes belonging to the said Nancy Rush, Sr., except one note against F. S. Rush and in favor of John Rush, and the said Jonas M. Rush shall make a true and correct report of all his doings on or before the first day of February, 1892, and it is hereby stipulated that the said Jonas M. Rush shall be allowed the sum of one dollar and fifty cents per day, and all necessary expenses, for all the time necessarily expended in collecting and settling said estate: Now, if the said Jonas M. Rush shall perform all the covenants above mentioned then this obligation to be void, otherwise to remain in full force and effect.*

JONAS M. RUSH, [Seal.]

JOHN W. SCOTT. [Seal.]"

Under this agreement and bond the Pierce notes came into the hands of Jonas M., and he thereafter purchased certain hay of Pierce at \$6 per ton, which was at the time

of the purchase estimated to amount to \$246 more than the sum due upon the notes. In part payment of the purchase he surrendered up the notes, and, as he claims, paid the remainder (\$246) out of other moneys collected by him, due his mother. Shortly after the purchase he sold the hay, but realized therefor less than he paid for it. Complainants insist that he made the purchase on his own account, being at the time engaged in the business of dealing in hay, and did not collect said notes as he had agreed to under his contract and bond as above stated, and that he is therefore liable to account for the full amount due upon the notes. He, on the other hand, claims that he took the hay in payment of the notes with the consent and under an agreement with the several parties interested to do the best he could with it, acting as their agent, and is liable only for so much of the said notes as he actually received in the transaction.

On a hearing at its June term, 1893, the circuit court dismissed the bill for want of equity, and complainants prosecuted an appeal to the Appellate Court for the Second District, which court, at its May term, 1894, reversed the decree of the circuit court and remanded the cause. (See 53 Ill. App. 454.) The concluding part of the opinion of the Appellate Court is to the effect that under the evidence then before the court it reached the conclusion "not only that there was no sufficient authority given to Jonas to purchase the hay on account of all interested in the notes and to surrender the notes to Pierce, but that he made the purchase on his own account." The remanding order of the Appellate Court, as shown by its opinion, (the judgment not otherwise appearing,) was as follows: "We think he should be compelled to account for the amount of the notes, and the decree will therefore be reversed and the cause remanded." The cause being re-instated upon the docket of the circuit court, it was subsequently referred to the master and additional evidence taken by both parties. Complainants objected to the taking of further

evidence, upon the ground that the decision of the Appellate Court as to the liability of the defendant Jonas M. Rush to account for the amount due on the Pierce notes was final and conclusive, and that no further evidence could be properly taken and heard in the case. The master having reported the additional evidence taken, (without his conclusions of law and fact,) the circuit court again heard the cause and entered a second order dismissing the bill at the costs of the complainants. From that decree an appeal was prosecuted to the Appellate Court, and this appeal is from a judgment of affirmance there rendered.

Two grounds of reversal are here urged: First, that the circuit court erred in permitting further evidence to be heard upon the remandment of the cause; and second, that, treating that evidence as competent and proper, the whole of the testimony was insufficient to justify the decree rendered.

The first point is without merit. It will be observed that the remandment to the circuit court was general. The court below was not required to proceed according to the opinion of the Appellate Court, nor were any specific directions whatever given. We said in *Parker v. Shannon*, 121 Ill. 452, following a uniform line of decisions to the same effect (p. 454): "When this court reverses a cause and remands it generally, without any specific directions, amendments to the pleadings may be allowed upon the re-instatement of the cause in the court below." And in *Perry v. Burton*, 126 Ill. 599 (on p. 601): "Inasmuch as the cause was reversed and remanded without directions, we think that the trial court had the power to allow amendments to the pleadings and to permit the introduction of other evidence, in accordance with the views expressed in *Chickering v. Failes*, 29 Ill. 294, and *Cable v. Ellis*, 120 id. 136." See, also, *West v. Douglas*, 145 Ill. 164, and cases cited.

Counsel for appellants seem to understand that the statement in the opinion, "we think he should be compelled to account," etc., is a decision upon the question

which must be considered in connection with the order remanding the cause, and therefore amounts to a specific direction to the trial court. The conclusion of the Appellate Court that Jonas M. should be compelled to account was based upon the evidence then in the record, and to say that that expression would preclude the admission of additional evidence under a general order reversing and remanding the cause would be to say that the decisions above quoted are meaningless. It is true that, however general may be the order of remandment, the court below is concluded in its further proceedings by the principles and rules of law announced in the opinion of the Appellate or Supreme Court, but that rule has no application to the question here involved. Whether the defendant Jonas M. should be required to account was purely a question of fact. The court, seeing that under the evidence then before it he should be required to do so, remanded the cause for further proceedings without any specific directions, and left that question open for further action, either by way of amendment to the pleadings or the introduction of other evidence.

In our opinion there is more difficulty in the second point. By the terms of his contract and the condition of his bond the defendant Jonas M. Rush was bound to use reasonable diligence to collect those notes in full, and undoubtedly had the right to do so in whatever manner he saw fit, but he could not attempt to do so by receiving in payment therefor anything except money, nor require the parties for whom he acted to receive less than the amount called for by the notes. In other words, we think the contract and bond made a *prima facie* case for the complainants, and in the absence of proof to the contrary they were entitled to an accounting for the whole amount due upon the Pierce notes. The burthen of proof being upon the defendants to overcome that *prima facie* case, we think the evidence fails to show that they have satisfactorily done so. Upon the first hearing Jonas M.



testified in a vague way to a proposed purchase of the hay from Pierce by himself and the other heirs jointly, which was talked of about the first of July or the latter part of June, 1891. But this, it appears, was before the date of the agreement and bond. At no time does he testify to a definite contract and understanding between himself and all the other parties interested, in and by which the terms of the agreement and bond were to be set aside respecting the collection of the notes in question. Nor does it appear from the evidence that these parties subsequently ratified his act as a purchase on their behalf. The principal witness who undertakes to support Jonas M. in his contention is one Laird, who drew the bond. Much reliance was placed upon his evidence by the Appellate Court when considering this cause the second time. He says he heard some of the heirs, who were present when he was drawing the bond, talking about this hay, and he understood from them that the hay was to be bought for the estate, yet he remembered no definite agreement or direction to that end. Without reviewing the testimony of other witnesses in detail, we think it tended to preponderate in favor of the complainants' theory.

From a careful consideration of all the evidence introduced upon the second hearing we are satisfied the facts as at first found by the Appellate Court are not materially changed. The decree of the circuit court and judgment of the Appellate Court will accordingly be reversed and the cause will be remanded to the circuit court, with directions to enter a decree requiring the defendant Jonas M. Rush to account, as prayed in the bill.

*Reversed and remanded.*

WILLIAM H. DOOLEY

v.

JOHN VAN HOHENSTEIN.

*Opinion filed December 22, 1897—Rehearing denied February 2, 1898.*

1. ELECTIONS—*when judges' returns are not conclusive of election though ballots have not been properly preserved.* The returns of the judges of election are not conclusive evidence of the result, though the ballots are objects of suspicion by reason of undue exposure or want of proper preservation, where the judges have been so careless in performing their duties as to cast discredit upon the returns.

2. SAME—*in absence of evidence judges are presumed to have proclaimed result of election.* In the absence of evidence that the judges of election made no proclamation of the result of the election, as required by law, it will be presumed, on contest, that they performed their duty in that regard.

3. SAME—*when error to find that judges made no proclamation of result.* It is error for the court, in an election contest, to find in its decree that the judges made no "proclamation" of the result, where the contestant's petition contains an allegation, admitted by the answer and not denied by evidence, that the judges canvassed the votes, and by their canvass, announcement and return the contestant was declared elected by a certain number of votes.

4. SAME—*judges' failure to properly preserve ballots does not destroy their character as evidence.* The failure of election judges to place the ballots in a sealed envelope, according to law, will not be allowed to destroy the character of the ballots as evidence, so as to make the judges' return conclusive of the result of the election, particularly where it appears that the judges made mistakes in counting and sorting the ballots.

APPEAL from the Circuit Court of McLean county; the Hon. THOMAS F. TIPTON, Judge, presiding.

ROWELL, NEVILLE & LINDLEY, and OWEN & OWEN, for appellant.

A. J. BARR, and MAYNE POLLOCK, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

This is an appeal from a decree of the circuit court of McLean county in a contested election proceeding, declaring that Amos Rutlege, the democratic candidate,

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| 170  | 630  |
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| 170  | 630  |
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| 170  | 630  |
| 192  | 1 60 |

was elected mayor of the city of Leroy, in that county, by a majority of seven votes, at the city election held on April 20, 1897, instead of William H. Dooley, the republican candidate, who received the certificate. The petition was filed by appellee, an elector. Upon the face of the returns as made by the judges and clerks of election Dooley appeared to have received 226 votes and Rutlege 221 votes, but upon the re-count, on the hearing in the circuit court, it appeared that Rutlege had received 226 votes and Dooley 219 votes. No controversy is raised in the argument here as to illegal votes or defective ballots, but the sole contention of appellant is, that the count as made by the judges of election and shown by their returns should prevail over the count made by the circuit court from the ballots as they appeared when produced at the trial.

"The rule is, that in a contested election proceeding the ballots are better evidence of the number of votes received by the respective candidates than the count made by the judges of election, where such ballots have been preserved according to law, and have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with.—*Hudson v. Solomon*, 19 Kan. 177; *Kingery v. Berry*, 94 Ill. 515; *People v. Burden*, 45 Cal. 241; *Cooley's Const. Lim.* (6th ed.) 788; *McCrary on Elections*, (2d ed.) secs. 555, 277; *Murphy v. Battle*, 155 Ill. 182." (*Beall v. Albert*, 159 Ill. 127; *Catron v. Craw*, 164 id. 20.) But as held in *Catron v. Craw*, *supra*, even when the ballots are objects of suspicion by reason of a want of proper preservation and by reason of undue exposure, yet the returns should not be accepted as conclusive if the judges of the election have been so careless in the performance of their duties as to cast discredit upon their returns. In other words, the evidence may be such as to discredit, as evidence, to some extent, at least, both the ballots and the returns, and to adopt an inflexible rule that either should be con-

clusive of the result in such cases would tie the hands of the court and put it in the power of designing persons to carry out their fraudulent schemes to change the actual result of an election.

In the case at bar the evidence showed that after having finished their count the judges of the election strung the ballots on a wire and sealed the ends, as the statute required, but having no envelope large enough to contain the ballots they placed them in the ballot-box unenveloped, locked the box, and delivered it, between eight and nine o'clock of the same evening, with the key, to the city clerk at his store. The judges informed the clerk at the same time of the condition of the ballots, and asked him if it would make any difference, and he replied that he did not know that it would, but that they could straighten that out afterwards. During the same evening the city clerk opened the box and took out the official poll-lists to make a copy of the returns, and permitted one of appellant's attorneys, who came into his store about that time, also to make a copy of the same. The city clerk testified, also, that he put the box containing the ballots behind the counter in his store, about half an hour after it was brought in by the judges, and left it there for the night, but did not remember whether he left the key in an unlocked drawer in the store that night or had it in his pocket; that no one tampered with the ballots in any way, so far as he knew or had any reason to believe; that he was not in the store after ten o'clock that night until about eight the next morning, and was out frequently the next day. It was also shown that Rutlege was his father-in-law and frequently came into the store, but there was no evidence whatever tending in the slightest degree to show that Rutlege saw, or had anything to do with, the box or its contents. The city clerk further testified that the next evening after receiving the ballot-box he called the three judges in, and told them he wanted the ballots sealed up,—that if they had to go into court

he wanted them in the right shape; that he then unlocked the box in the presence of the judges, and the ballots were taken out and put in an envelope and sealed up; that before that, any one, if the box were opened and he had access to it, could have marked the ballots without removing them from the wire. The city clerk had in his employ in his store two clerks, who testified that no one interfered in any way with the ballot-box while they were in the store, and that they did not see the key or know where it was.

The contention of appellant is, that the ballots, not having been put into an envelope and sealed up, as required by law, before they were delivered to the clerk, but having been left in a condition in which any one, on obtaining access to the box, might easily change a sufficient number of the ballots by the simple process of marking a cross in the square opposite Rutlege's name, without leaving means of detecting the fraud, lost their controlling effect as the best evidence, and that the result as declared by the judges should stand, and that the circuit court erred in not so holding. That court found by the decree that no proclamation was made by the judges of the election at the close of the count made by them, as required by law. Section 27 of the Ballot law, after providing for the canvass of the vote, requires that "each judge of election, in turn, shall then proclaim in a loud voice the total number of votes received by each of the persons voted for and the office for which he is designated. \* \* \* Such proposition [proclamation] shall be *prima facie* evidence of the result of such canvass of the ballots." And it was held in *Catron v. Crow*, *supra*, that in the absence of such proclamation the returns in that case could not be regarded as *prima facie* evidence of the result.

We cannot agree with the trial court in finding that no proclamation was made by the judges in the case at bar, as required by the statute. No evidence was given on that subject, or in any way bearing upon it, on behalf

of either party, and in the absence thereof it should have been presumed that the judges performed their duty in that regard. But even if, in other respects, in making the canvass it were shown that the judges so far disregarded the duties imposed upon them by the statute that no presumption in the particular mentioned could be indulged in their favor, still it was alleged in the petition by the contestant "that the clerks and judges of said election at said polling place" (and there was but one) "canvassed the votes, and by their canvass, announcement and return said William H. Dooley was declared elected by five votes." This allegation was admitted by the answer, and there was no reason for giving any evidence on the subject. The statute requires no "announcement" except the "proclamation," and the allegation of the petition admitted by the answer must be understood as settling the question, by the pleadings, that the proclamation was made. In Webster's International Dictionary "announcement" is defined to be "the act of announcing or giving public notice; that which announces; proclamation; publication." Hence it was error to find that the judges made no proclamation as required by law. But whether such error should operate to reverse the decree depends on the effect which should be given to such proclamation and returns on the one hand, and to the ballots on the other, which returns, etc., and ballots, were properly admitted in evidence, as held in *Catron v. Crow*, *supra*, it having been shown, as contended by appellee, that the judges of election did make mistakes in their canvass. As said in *Murphy v. Battle*, *supra*, the credit to be given to the canvass of the judges of election is measured by their compliance with their duty.

Comment is made upon the fact that the initials of none of the judges had been endorsed on any of the ballots, as the statute requires, and the contention is made that the evidence clearly shows that the judges and clerks of election did make mistakes in their count, and that

the returns are thus discredited. There were 461 ballots in the box when counted by the judges, but only 459 names on the list of those who had voted, and the judges, finding two ballots so mutilated they could be counted for no one, instead of drawing from the box two ballots, so as to make the number agree, laid aside and refused to count the two defective ballots. When they had thus made the numbers agree they separated the ballots into four piles: one of 186 straight republican tickets as voted containing the name of Dooley, one of 158 straight democratic tickets as voted containing the name of Rutlege, one of 96 mixed tickets as voted, and one of 19, containing, as it was supposed, no vote for mayor. While later in the count the judges found that the pile of 19 ballots did contain at least seven votes for mayor, four for Dooley and three for Rutlege,—one of the judges testifying that it contained five straight republican tickets and three straight democratic tickets voted,—still, the controversy of fact, as presented by both parties, seems to center principally upon the answer to the question, What was the actual number of votes cast for the straight republican ticket? The judges counted 186. On the re-count in the circuit court on the trial there were but 177,—nine less than the judges counted,—and 157 straight democratic tickets,—one less than as counted by the judges. On the re-count in court it was found and agreed that there were eight ballots marked in pencil with a cross in the circle at the left of the party name "Republican" and also in the square at the left of the name "Amos Rutlege" on the other ticket designated "Democrat," and one ballot marked in the same way, except that the cross in the circle was marked in ink and the one in the square in pencil. The evidence showed that there were pen and ink and pencils in the voting booths.

It seems that the judges of election must have placed these nine ballots in the pile of straight republican tickets and counted them for Dooley, as they were necessary

to make the number of such tickets 186, and the theory of appellant is that these nine ballots must have been changed after they were counted by the judges and clerks. On this theory no one could have voted at that election for the straight republican ticket with the exception of the candidate for mayor, which is indeed possible but would hardly seem probable. The three judges, two clerks, two challengers (one for each party) and two persons who had checked off the voters as they voted,—nine in all,—were called as witnesses, and agreed, in substance, in their testimony, that there were 186 ballots in the pile of straight republican tickets, which were counted for Dooley for mayor. It seems that Williams, the democratic judge, called them off and laid them down in the pile, while Patterson, a republican judge, looked over his shoulder, and King, one of the clerks, stood by and watched the count while the other clerk kept tally. Patterson and King were positive that these 186 ballots were straight republican tickets as voted, others testified similarly, though not so positively, and no one to the contrary. Williams testified to a mistake made in putting five straight republican and three straight democratic ballots with the pile of 19 as containing no vote for mayor, and that he asked for a recount, but did not get it. Others testified there were but four of such republican votes for mayor, but did not testify whether they were what were called straight tickets or not. It is clear, however, that but seven of the pile of 19 were votes for mayor, as there were 12 left after the judges rectified this mistake. It does not appear, however, that these four votes for Dooley were counted in making the pile of 186 straight tickets, but whether they were or not, it would have been impossible to change the majority of five votes for Dooley, as found by the judges of election, to seven for Rutlege, as found by the circuit court, by the supposed change of nine straight republican tickets to nine for Rutlege for mayor, for that would have made a change of 18 votes, and made Rutlege's ma-



majority 13, instead of seven,—that is, on the supposition that the judges made no mistakes in counting the mixed tickets. So the supposed change of nine votes proves too much, and unless there was some other change,—and that, too, against Rutlege,—it proves that the judges of election made a mistake in their count. It appears clear that they did make mistakes in their count of the mixed tickets. They gave Dooley only 40 of these, which, added to the 186 straight votes, made 226 votes as returned by them. The court gave him 42 of the mixed tickets, which, added to the 177 straight votes, made 219 as counted by the court. It appeared at the trial, and the court found, that there were 14 blank ballots as to the office of mayor, not including the two mutilated ballots, instead of 12 as found by the judges of election. Unless there had been erasures of crosses made by the voters after the count by the judges, or a substitution of ballots, the judges of election must have counted for Dooley these nine ballots which on the trial in the court below were found marked for Rutlege. This may have been done by mistake, as Rutlege was the only democratic candidate voted for on these ballots; and as it was not shown that there was any appearance of erasures or of substitution of ballots, or that the sealing of the wire had been interfered with in any way, it would seem more probable, from all of the evidence, that such a mistake was made, than that these nine ballots were changed after they had been counted. However, all reasoning based on the number of straight tickets is very liable to error. As Rutlege gained five votes on the recount but lost one on the straight tickets, he must have gained six votes on the mixed tickets. The nine ballots here in controversy now appear as mixed tickets, so it might seem as if some of them had been counted by the judges for Rutlege, as he only gained six on the recount. If the judges, in scanning the so-called 186 straight republican tickets, had failed to notice a cross in the square opposite the name of any candidate on the democratic

ticket, for mayor or for some other office, they would have counted them as straight, but on the re-count such cross would be detected and the tickets would not be reported as straight tickets by the court, while Dooley would not lose any votes by such a change if the cross were found for any candidate for any other office than that of mayor. As we have seen, Dooley gained two votes on the mixed tickets on the re-count. Who lost the votes that afterwards on the re-count turned out to be blank for mayor cannot be determined with any certainty, but it is reasonably certain that the judges of election did make mistakes in their count, and, that fact being demonstrated, their returns are so far discredited and cannot be held conclusive.

Section 27 of the Ballot law provides: "Immediately after making such proclamation, and before separating, the judges shall fold in two folds, and string closely upon a single piece of flexible wire, all ballots which have been counted by them, except those marked 'objected to,' unite the ends of such wire in a firm knot, seal the knot in such manner that it cannot be untied without breaking the seal, inclose the ballots so strung in an envelope, and securely tie and seal such envelope with official wax impression seals, to be provided by the judges, in such manner that it cannot be opened without breaking the seals, and return said ballots, together with the package containing the ballots marked 'defective or objected to,' in such sealed package or envelope to the proper clerk," etc. The judges, in failing to enclose the ballots in an envelope and sealing it according to the statute, neglected one of the most important duties required of them for the preservation of the ballots, and if, under all the evidence in this record tending to show mistakes and the omission to perform duties required of them, their returns should be held conclusive, it would put it in the power of judges of election in other cases to finally determine the results of elections by their own returns, carelessly or willfully

made inaccurate, by simply omitting to seal up the ballots. There was a neglect of duty in this case by the judges of election, as well as by the city clerk, but the ballots were admissible in evidence. The court below saw and heard the witnesses testify, and inspected the ballots, and we cannot say from the whole record that the conclusion there reached that Rutlege received a majority of the votes and was elected mayor of the city in question was erroneous.

The decree is affirmed.

*Decree affirmed.*

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JOHN W. MARTIN *et al.*

*v.*

JOSEPH S. MARTIN.

*Opinion filed December 22, 1897.*

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| 170 | 689  |
| 194 | 1502 |
| 170 | 689  |
| 212 | 854  |
| 218 | 217  |

1. **CONTRACTS**—*when verbal contract affecting interest in land may be enforced regardless of Statute of Frauds.* A verbal contract affecting an interest in land may be enforced in equity notwithstanding the Statute of Frauds, where it has been so far performed that its repudiation by one party would perpetrate a fraud upon the others.

2. **PARTITION**—*tenant in common may be estopped by agreement to demand partition.* A tenant in common will be estopped to demand partition, by his agreement with the other co-tenants to hold the lands in common and lease them until a period of temporary depression in the value of land should pass away, where such agreement is so far performed as that leases were made to parties who were in possession, and their terms not expired, when the bill for partition was filed.

**APPEAL** from the Circuit Court of Whiteside county; the Hon. JAMES SHAW, Judge, presiding.

This was a bill in chancery filed on March 21, 1897, in the circuit court of Whiteside county, by Joseph S. Martin, against John W. and David L. Martin, Sarah Jane Dillon, and others. The bill alleges that one Catherine

Martin died July 23, 1863, possessed of certain lands described in the bill, and that she left surviving her, her husband, John Martin, and four children, viz., Joseph S. Martin, the complainant, John W. Martin, David L. Martin and Sarah Jane Dillon, (*nee* Martin,) to whom the title to said land descended, the husband taking an interest as tenant by the curtesy, and each of her said children taking an undivided one-fourth interest subject to the rights of the tenant by the curtesy; that said John Martin departed this life on the 16th day of May, 1896, seized in fee of the title to certain other lands specifically described in the bill, which said last mentioned lands descended to his said children, (he having no widow,) the said Joseph S. Martin, John W. Martin, David L. Martin and Sarah Jane Dillon, and that the said children of the said Catherine and John Martin, being the complainant in the bill and the hereinbefore named defendants thereto, thereby became seized of and are the owners of the undivided one-fourth each of the lands of which their deceased parents died seized, as aforesaid. The bill prayed for partition of the lands. The bill also alleged that in the conveyance of the title to the lands to Mrs. Martin an error was made in the description to one of the tracts, and made defendants to the bill the legal heirs and devisees of the grantor in the deed wherein the alleged mistake occurred, and prayed for a decree correcting such alleged error. The bill also made defendants thereto certain parties which the bill alleged were in the possession of different tracts of the land under leases executed by said complainant and the other heirs of John and Catherine Martin, since the death of said John.

Default was entered against Sarah Jane Dillon, and John W. and David L. Martin filed an answer to the bill. The answer, among other things, averred, in substance, that soon after the death of the father of the complainant and the respondents, the complainant and the respondents, in view of the fact the salable values of real estate

had become greatly, but, as the parties believed, only temporarily, depreciated in value, entered into a verbal agreement they would not seek to divide the lands but would allow them to remain as they were, and would jointly rent them and divide the rentals, and that each of the respondents and the complainant, who were engaged in the real estate business, would endeavor to obtain purchasers, and then all would join in a conveyance if a satisfactory sale could be obtained; that it was further agreed that the said complainant and the respondent David L. Martin should take charge and control of the lands; that in pursuance of such contract the lands were rented to the parties named in the bill as tenants in possession, for terms expiring March 1, 1898, and that leases were executed by the said respondents, the complainant and the said Sarah Jane Dillon to each of said tenants, entitling him to possession of the land until the said first day of March, 1898, upon terms and conditions set forth in the said leases.

Exceptions were filed by the complainant to such averments of the answer, and the court sustained the exceptions and ordered the said averments expunged. Such further proceedings were had in the case as that the court entered a decree correcting the error in the description of the lands in the deed to Catherine Martin, and declaring that the complainant, the respondents and the said Sarah Jane Dillon were the owners in fee of each an undivided one-fourth of the lands in the bill described, and decreeing partition thereof and appointing commissioners to make such partition. The commissioners so appointed reported the property was not susceptible of division among the owners thereof, which report was approved and a decree entered ordering the lands to be sold by the master and the proceeds to be divided among the owners thereof. This is an appeal prosecuted by John W. and David L. Martin to reverse the decree of partition and sale.

H. C. WARD, for appellants.

WALTER STAGER, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

A single question is presented by the record, and that is whether the court correctly ruled the exceptions to the answer were well taken. The general rule is, an adult tenant in common may demand partition as a matter of right. (*Hill v. Reno*, 112 Ill. 154; *Trainor v. Greenough*, 145 id. 543; *Ames v. Ames*, 148 id. 321.) But there are certain well recognized exceptions to the rule. In *Hill v. Reno*, *supra*, an instance of such exception is stated in the following language (p. 161): "If several tenants in common or joint tenants should covenant between themselves that the estate should be held and enjoyed in common, only, equity would not, in the absence of special equities, award a partition at the suit of some of the parties, against the objections of the others." And this court in the same case expressly declared "that equity will not award a partition at the suit of one in the violation of his own agreement. \* \* \* The objection to partition in such cases is in the nature of an estoppel." Mr. Freeman, in his work on Co-tenancy, (sec. 457,) declares the absolute right to partition is possessed by an adult tenant in common in the absence of "special obligations existing independent of the co-tenancy." The conclusion reached by the author of that portion of the American and English Encyclopedia of Law devoted to the subject of "Partition" (17 Am. & Eng. Ency. of Law, p. 693,) is, that the absolute right to a partition may be waived by agreement. The Supreme Court of Michigan, in *Eberts v. Fisher*, 54 Mich. 294, held that a tenant in common might become estopped, by his agreement, to demand partition, and that an agreement to lease the premises for a term of years, shown to have been made in the case, was sufficient to warrant a decree dismissing the bill for partition.

It seems clear, upon both principle and authority, a tenant in common may become estopped to demand partition by his covenant the land shall be held in common.

But it is urged in behalf of complainant. the agreement set out in the answer in the case at bar was verbal, merely, and therefore not enforceable, by reason of the familiar provision of the Statute of Frauds and Perjuries that no one shall be charged upon a verbal contract concerning any interest in lands. The complainant came, by his bill, into a court of equity; and the equitable rule is that a verbal contract affecting or concerning an interest in lands may be enforced, notwithstanding the Statute of Frauds and Perjuries, if it has been so far performed as that to permit the party to repudiate it would of itself be a fraud. (*Morrison v. Herrick*, 130 Ill. 631; *Koch v. National Union Building Ass.* 137 id. 497.) It appeared from the averments of the answer that the complainant and respondents mutually agreed with each other that "they would not seek to divide the land in view of the fact the salable value of real estate had been greatly, but, as the parties believed, only temporarily, depreciated in value, and that the complainant and respondent David L. Martin should take charge and control of the lands," and that the complainant and the respondents would endeavor to secure purchasers for the land at satisfactory prices, etc. The answer further alleged that the complainant and defendants joined in leasing the lands to different tenants for terms expiring on the first day of March, 1898, and that such tenants were in possession of the lands under said leases. It does not appear from any averment of the answer that the parties agreed upon a definite period of time during which neither should take steps to have the lands partitioned. It clearly appears that the agreement was entered into upon the mutual understanding of the parties that the real estate was so situate it could not be partitioned, and that an effort to divide it by proceedings in court would result in a sale of the land and

distribution of the proceeds of the sale, and that the purpose of the agreement was to avoid a sacrifice of the land at a forced sale while values were depreciated. It was not practicable, therefore, for that reason, to fix a definite period for the expiration of the agreement, but it is manifest from the acts of the parties in jointly leasing the lands and vesting the tenants with full right of possession and control thereof until the first day of March, 1898, that it was their intention the said agreement should remain in full force until that time, and no reason is perceived why the agreement, if otherwise enforceable, should not be regarded as binding the parties to refrain from seeking to partition the lands until such leases should expire. The execution of the leases would necessitate a sale subject to the rights of the lessees, should such a sale be made prior to the termination of their leases, and for that reason would tend to further reduce the price likely to be received for the property. The leases were in part performance of the verbal agreement, and in character such as to evince they would not have been executed but for the agreement. The execution of the leases and the investiture of possession in the tenants so changed the situation and rights of the parties as to make a repudiation of the agreement so unjust and unfair that equity ought not permit it to be repudiated. It would be inequitable to allow the complainant, while seeking the aid of a court of conscience, to invoke the Statute of Frauds to enable him to avoid an agreement which he had so partly performed, and which agreement, if enforced, would operate to estop him from asking the relief prayed for by his bill. The mutual undertakings of the parties to the agreement supplied the requisite consideration to uphold it.

We think the court erred in sustaining exceptions to the answer. The decree awarding partition of the lands must be and is reversed and the cause remanded to the circuit court, with instructions to overrule the exceptions to the answer. The decree rendered in answer to the



prayer of the bill that the error or mistake in the description of the property in the deed executed to Catherine Martin be corrected, is affirmed. The costs in this court will be taxed to appellee, Joseph S. Martin.

*Decree affirmed in part.*

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THE PENNSYLVANIA COMPANY

v.

THE KENWOOD BRIDGE COMPANY.

170 645  
211 518

*Opinion filed December 22, 1897—Rehearing denied February 2, 1898.*

1. CARRIERS—*fact that shipper loads his cars does not make him the carrier's agent for that purpose.* The fact that a shipper loads his cars at his manufacturing establishment for his own convenience, instead of delivering the freight at the station for loading, does not make him the agent of the carrier, so as to make the latter responsible for damages resulting from improper loading.

2. SAME—*carrier accepting goods in unusual condition, as a favor to shipper, may rely on his statements.* A carrier accepting for carriage, as a favor to the shipper, iron trusses bolted together, in which condition it is not bound to receive them, upon the shipper's representation the trusses, when loaded, would be of a certain height, may rely upon such representation, and is not liable for damages resulting from the shipper's misrepresentation as to such height.

3. EVIDENCE—*when declarations of a station agent are not admissible against railroad company.* Declarations of a station agent as to why a car loaded at his station was not inspected by the railroad company before its acceptance for transportation are not admissible against the company, where the agent was not employed as agent at that station until some time after the transaction to which his declarations relate.

4. SAME—*what evidence competent in suit by shipper against carrier.* Where, in a suit by a shipper for damages to certain trusses from their being too high to pass under a certain bridge, it is claimed by the shipper that the carrier might have taken another route and avoided the bridge, the carrier may show that at that time it had no arrangement to run over other carrier's lines, and had no track of its own except the one on which the bridge was located.

MAGRUDER, J., dissenting.

*Pennsylvania Co. v. Kenwood Bridge Co.* 69 Ill. App. 145, reversed.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. C. G. NEELY, Judge, presiding.

GEORGE WILLARD, for appellant.

BARKER & CHURCH, for appellee.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee brought this suit to recover the cost of repairing steel trusses which were broken and injured while being carried by appellant on its railroad from Grand Crossing, in Cook county, to South Chicago, in the same county, and on trial obtained a verdict for \$668.62, which was \$109.28 more than the cost of the repairs sued for. Appellee remitted said excess, and judgment was entered for \$558.84,—the amount of the claim. The Appellate Court for the First District affirmed the judgment and granted a certificate of importance, in pursuance of which the case is brought to this court, and appellant complains that improper evidence was admitted and improper instructions given for appellee, and proper evidence offered by appellant excluded.

In December, 1892, plaintiff had its works at Grand Crossing, and was about to make and ship to Schailer & Schniglau, at South Chicago, in the care of the Illinois Steel Company, certain trusses. If they were shipped in parts it would be necessary to rivet them together after they arrived at South Chicago, which would make an additional expense. If they were put together it would make a load higher than defendant would ship, and plaintiff, desiring to ship them in that way to save the added expense, applied to the station agent at Grand Crossing to see if permission could be obtained to ship in that way. The agent said that he could not permit it and had no

right to do so. He was then asked to apply to his superiors for permission, and for the purpose of complying with that request he inquired what the height would be. So far there was no dispute as to the facts, but there was a controversy as to what representation was made concerning the height. The station agent testified that Paul Willis, the secretary and engineer of the plaintiff, pointed to a truss lying on the ground and said it would be the same height as that one; that Willis proposed to measure it, and took a steel tape and held one end and the station agent held the other, and that they measured it and found it was just fifteen feet high. Willis contradicted this testimony, and said that he showed the station agent a drawing of the trusses made on a scale of half an inch to the foot, but did not tell the height. He admitted, however, on cross-examination, that the station agent asked for definite dimensions of the trusses to be shipped, and that thereupon he and the agent measured with a steel tape-line a truss which was lying there in the yard. The truss that was measured was fifteen feet high, and the agent took a memorandum of the height and wrote for the permission. After receiving a reply he told plaintiff that the trusses would be accepted. Plaintiff was accustomed to load the cars in its own yard, where it had a switch, and the defendant hauled them out to its road. The car in question was loaded in that way with trusses sixteen feet and four inches high from the platform of the car. According to its custom the railroad company hauled the car from the yard, and in taking it to South Chicago in its train the trusses were bent and broken in an attempt to go through the Calumet river bridge. The copy of the account sued on, annexed to the declaration, was for repairing trusses wrecked in the Calumet bridge, and it is plain from the record that it was conceded on all hands at the trial that the damage was done by the height of the trusses at the Calumet bridge.

The defendant was not bound to accept for transportation such property as these trusses. It did not, in general, undertake to carry such property and was not prepared to transport anything of that kind. It is conceded that it was not bound to do so, and this was well understood by the plaintiff when the permission was asked as a favor, to save expense to plaintiff. The evidence for the defendant was, that the trusses were wrongfully loaded by the plaintiff to the height of sixteen feet and four inches above the platform of the car, after having represented to the defendant that they would be only fifteen feet in height. When the favor was asked for and the station agent inquired for the definite dimensions and height of the trusses, he was entitled to a fair and honest disclosure, and information which he could give to his superiors. The president of plaintiff testified that the station agent agreed to communicate with one Law, a division superintendent of the road, for the permission, and that the witness told the agent that he could not tell him what the height of the trusses would be. The engineer, Willis, who drew the plans and knew the facts, according to his account did not give the station agent any height, but referred him to his drawings, and told him that he could scale the drawings if he wanted to. If the testimony for defendant was true there was a distinct misrepresentation. It has always been held that a carrier is not responsible for a loss or injury resulting from the misconduct, fraud or deceit of the owner. (*Chicago and Aurora Railroad Co. v. Thompson*, 19 Ill. 578; *Chicago and Alton Railroad Co. v. Shea*, 66 id. 471; *Elliott on Railroads*, sec. 1491.) In this case the height of the trusses was the direct and proximate cause of the injury. If the permission was given to load them at a height of fifteen feet, so that they would pass under wires and bridges on the road, and they were loaded at a greater height, so that they could not pass under a certain bridge, it would conflict with the plainest principles of justice to permit the plaintiff to recover for

the injury resulting from its own fault, unless the defendant had knowledge of the fact. There was no evidence of such knowledge.

But it is insisted that the defendant was bound to inspect the car before taking it on its road, and ascertain the height of the trusses, and to show a fault on the part of defendant in that respect the court permitted in evidence proof that one Kertz, who at the time of the shipment was a clerk for defendant at another station and knew nothing about the occurrence, stated two or three weeks afterward that the car was not inspected before it went out, because the inspector was drunk. The shipment was December 20, 1892, and this man Kertz did not become defendant's agent at Grand Crossing until January 7, 1893. It was after that time that the statement was made. It is a well established rule that the declaration of an agent or servant can only be admitted in evidence if, at the time of making the declaration, he is doing something about the business of his principal. It is because the declaration is a verbal act and part of the *res gestæ* that it is admissible at all, so that if what the agent did is admissible as evidence, what he said about the act while he was doing it is also admissible, but not otherwise. (1 Greenleaf on Evidence, sec. 113; 1 Phillips on Evidence, 201; *Jenks v. Burr*, 56 Ill. 450; *Ohio and Mississippi Railway Co. v. Porter*, 92 id. 437; *Phenix Ins. Co. v. LaPointe*, 118 id. 384; *Summers v. Hibbard & Co.* 153 id. 102). In this case Kertz did not even know anything about the supposed facts.

One of the plaintiff's claims seems to have been that the defendant might have taken the car to the steel company's works by some other route, without going through the Calumet bridge, and it is shown that it afterwards took them, when repaired, by some other way. There was no evidence that the defendant had any right, at the time of the shipment, to run over a switch into the yard of the steel company without going over the bridge, and

the defendant proved that it had no arrangement at that time by which it was permitted to run cars from its line to such works of the steel company. The court refused to permit the defendant to prove further that it did not own or operate any track at that time leading from its main line into said works. The evidence was competent, and should have been admitted.

The second instruction given at the request of plaintiff is as follows:

"You are instructed that if you believe, from the evidence, that the car in question was loaded by the plaintiff and received by the defendant so loaded, that then the defendant made the plaintiff its agent for the purpose of loading the car, and it became the duty of the defendant to ascertain that the car was properly loaded when the same was received by it."

The instruction was wrong, as applied to this case. If the duty rests primarily upon the carrier to load and unload freights delivered at its stations or warehouses, there is surely no reason why the shipper may not, by contract express or implied, assume that duty. In this case it was the custom of plaintiff, instead of bringing its freight to the station, to have cars taken into its yard and load them there. Defendant never assumed the duty of loading cars for plaintiff at that place, but the understanding was that plaintiff would load them. Whether this was done to save charges, or for convenience to avoid the labor and expense of delivery at the station, or for whatever reason, the loading was not done by plaintiff as the agent of defendant. The instruction made the defendant responsible for the act of the plaintiff in loading the car so that it would not go through the bridge, on the ground of agency, although the jury might believe that the loading was wrongful. It also required an inspection at all events, regardless of the question whether the trusses were to be only fifteen feet high, or whether the circumstances were such that defendant had

a right to rely upon an understanding that they would be of that height, and not measure them to see whether the understanding had been disregarded. The instruction was wrong.

The sixth instruction given for the plaintiff was as follows:

"The jury are instructed that if, after the car was loaded, an agent or employee of the defendant saw it as it was loaded and made no protest as to the manner of its having been loaded, and if the jury believe, from the evidence, that the goods were not delivered in as good order as when received by the defendant, ordinary wear and tear excepted, and that the plaintiff was injured and has sustained damage thereby, then the plaintiff is entitled to recover, unless the jury believe, from the evidence, that the injury resulted from the act of God or the public enemy."

The trainmen unquestionably saw the car. They could not have hauled it without seeing it, and this instruction was equivalent to a direction for a verdict regardless of all defenses. It ignored the alleged agreement as to the height to which the car was to be loaded; and under it, if an agent or employee of the defendant, whether fireman, section-hand or laborer, saw the car and made no protest, defendant would be liable, regardless of the question whether the difference in height would be noticeable to such employee and whether inspection was within the scope of his employment. It required every employee of defendant to know the exact height of the trusses and the height of the Calumet bridge, and was clearly wrong.

For the errors indicated in admitting and rejecting evidence and giving instructions, the judgments of the Appellate Court and circuit court are reversed and the cause remanded to the circuit court.

*Reversed and remanded.*

Mr. JUSTICE MAGRUDER, dissenting.





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